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IN THE

Supreme Court Of The United States

October Term, 1991

NORA D. BRAYSHAW, M.D.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of New Jersey violated petitioner Dr. Nora D. Brayshaw's procedural due process rights, guaranteed by the Fourteenth Amendment of the Constitution, by (a) suspending her from the practice of medicine after a preliminary hearing lasting one hour, commenced only three working days after notice to her; and (b) extending her post-suspension hearing over a period of two and one-half years?

2. Whether the State of New Jersey violated Brayshaw's procedural due process rights, guaranteed by the Fourteenth Amendment of the Constitution, by placing on her the burden of proof to establish the absence of a legitimate state rationale for a protracted two and one-half year post-suspension hearing in direct conflict with the precedents of this and other federal courts?

3. Whether the State of New Jersey violated Brayshaw's procedural due process rights, guaranteed by the Fourteenth Amendment of the Constitution, by denying her access to materials necessary for the cross-examination of hostile witnesses by invocation of the physician-patient privilege, while simultaneously permitting the State unlimited access to similar patient materials used in the prosecution of the State's case?

PARTIES TO THE PROCEEDING

Petitioner Nora D. Brayshaw ("Brayshaw") (M.D. Stanford Medical School, 1977; Ph.D. Columbia University, 1974; graduate fellow at Rockefeller University from 1965 to 1967), after eighteen years of study and training, was engaged in the practice of psychiatry until the State of New Jersey summarily suspended her on September 9, 1987 and reaffirmed the suspension on February 14, 1990. Respondent is the State of New Jersey, acting through the New Jersey State Board of Medical Examiners ("the Board"), a private association of medical practitioners acting under color of state authority.

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STATE OF NEW JERSEY,

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION

NORA D. BRAYSHAW respectfully petitions for a writ of *certiorari* to review the decision of the New Jersey Superior Court Appellate Division.

OPINIONS BELOW

The unpublished opinion of the New Jersey Superior Court Appellate Division is reprinted in the Appendix ("App.") to this petition at 2a-11a. The Supreme Court of New Jersey denied the petition for certification of the case. (App. 1a)

STATEMENT OF JURISDICTION

The judgment of the New Jersey Superior Court Appellate Division was entered on January 14, 1992. Brayshaw filed a petition for certification in the Supreme Court of New Jersey seeking review of the January 14, 1992 judgment. The Supreme

Court of New Jersey denied certification on March 24, 1992, and the judgment was entered on March 26, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation of the Due Process Clause of the Fourteenth Amendment of the Constitution, which provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. Amend. XIV, §1.

The relevant portions of Titles 45 and 52 of New Jersey Statutes Annotated, 45:1-10, 45:1-21, 45:1-22, 45:9-16(h), 52:14B-10(a) and (c), and 52:14B-11, are set forth at App. 57a-61a.

STATEMENT OF THE CASE

This case presents the Court with an egregious abuse of state power. The Board imposed draconian burdens on Brayshaw by means of a needlessly prolonged two and one-half year post-suspension proceeding. Brayshaw was denied the opportunity to defend herself by, *inter alia*, the selective application of the physician-patient privilege during the proceeding. At the conclusion of the process, the Board overruled the ultimate decision of the administrative law judge ("ALJ") on many counts (App. 7a), holding Brayshaw to the standard of an endocrinologist, not a psychiatrist (App. 18a-21a), and imposing a prospective suspension that destroyed Brayshaw's professional practice and reputation. (App. 54a-55a)

The Board suspended Brayshaw from the practice of medicine primarily because of its ostensible disapproval of her

practices of prescribing Synthroid, a safe and commonly used thyroid supplement, without communicating with her patients' internists, and of returning telephone calls through her support staff. (App. 12a) None of Brayshaw's patients suffered significant adverse medical effects as a result of her alleged malpractice in the prescription of Synthroid. The principal asserted effects of Brayshaw's alleged malpractice were anxiety, fatigue, irritability, and heart palpitations (App. 28a-29a, 35a-36a)—symptoms that were characteristic of Brayshaw's patient cohort, whether or not medicated with Synthroid. The Board commenced its investigation at the behest of competing endocrinologists in the New Jersey medical establishment, who apparently resented Brayshaw's successful use of Synthroid as an invasion of their turf.

The Board accomplished its destruction of Brayshaw's medical practice by a needlessly protracted post-suspension hearing, lasting approximately two and one-half years, and the unnecessary multiplication of redundant counts. Through the deliberate escalation of the controversy beyond all reasonable bounds, the Deputy Attorney General ("the State") succeeded in depriving Brayshaw of her counsel, who departed without leave in the face of Brayshaw's inability to compensate him, thus forcing her to proceed *pro se*.

The State successfully invoked the physician-patient privilege to bar Brayshaw from securing evidence necessary to confront and cross-examine witnesses testifying against her. (App. 52a) Although certain patients testified that they had suffered symptoms, such as irritability, fatigue and heart palpitations, after Brayshaw's prescription of Synthroid, Brayshaw was systematically denied access to medical records that could demonstrate that those patients had either experienced similar symptoms prior to the prescription of Synthroid or were taking other drugs that produced the same symptoms. At the same time, the ALJ allowed the State to introduce evidence against Brayshaw drawn, over protest, from her own medical records of the same patients, overriding any claims of physician-patient privilege.

As shown below, the protracted two and one-half year post-suspension hearing to which Brayshaw was subjected by the

unreasonable multiplication of the counts against her far exceeded the constitutional limits imposed by other courts in evaluating the constitutionality of similar proceedings. In reviewing the Board's determination, the State of New Jersey violated Brayshaw's due process rights by placing on her the burden of demonstrating the absence of a state justification for the delay, in direct conflict with many, though not all, of the decisions of federal courts reviewing similar claims. As a result, this case presents not only a flagrant deviation from this Court's past due process limitations on the duration of post-suspension hearings, but also an opportunity to resolve the conflict that has arisen in the courts with respect to the standards to be applied in reviewing claims of unconstitutional delay.

In destroying Brayshaw's medical practice, the Board engaged in an unfair, one-sided application of the physician-patient privilege to bar Brayshaw's access to evidence necessary to cross-examine hostile witnesses, thus denying Brayshaw due process of law. In relying on the physician-patient privilege to do so, the Board raised a significant unresolved issue for this Court's review—whether the physician-patient privilege can be used to deny access to evidence necessary for cross-examination in the context of an administrative proceeding designed to deprive a person of her property rights. By applying the privilege to restrict Brayshaw's access to such evidence while allowing the State to obtain medical records regardless of the existence of a privilege, the state agency denied Brayshaw the procedural due process guaranteed by the Fourteenth Amendment.

1. *Material Facts.* Petitioner, Dr. Nora D. Brayshaw, received a Ph.D in biochemistry and biochemical genetics from Columbia University in 1974, after years of research and training at the Rockefeller University and Stanford University. (App. 3a) She obtained her medical degree from Stanford Medical School in 1977, completing an internship in medicine and pediatrics and a residency in psychiatry. (App. 3a) Brayshaw received specialized training in consultation-liaison, the interface of psychiatry with medicine, at Stanford and as Chief Resident at Mount Sinai Medical School. Altogether, Brayshaw spent approximately eighteen years in training for her practice.

As staff psychiatrist at Fair Oaks Hospital in Summit, New Jersey (App. 3a), Brayshaw acquired extensive experience in diagnostic evaluation of psychiatric patients and biological psychiatry, the use of pharmaceuticals to treat psychiatric disorders. (App. 3a) Upon leaving the Fair Oaks Hospital, Brayshaw commenced her own practice, marshalling years of experience and innovation to address the interrelationship between thyroid disorder and mental illness. (App. 3a) In conjunction with this practice, Brayshaw prescribed Synthroid to some of her patients for depression-related disorders.

With a thriving and rapidly growing practice of over 1,000 patients, Brayshaw incurred the resentment of area endocrinologists and internists, with whose specialties her practice overlapped. The inquiry that eventually stripped Brayshaw of her practice originated with the efforts of several practitioners in endocrinology and one Board member to discredit Brayshaw, rather than with the complaints of either patients or fellow psychiatrists.

On the afternoon of September 2, 1987, Brayshaw was served with a twenty-nine count Administrative Complaint alleging multiple violations of New Jersey Title 45 and related administrative regulations. (App. 3a) She was given notice of a September 9, 1987 hearing on temporary suspension of her medical license. (App. 13a) Most of the counts against Brayshaw alleged that she had committed negligence or gross negligence by failing to perform physical examinations before prescribing Synthroid, by prescribing Synthroid in the manner and quantity alleged, and by not personally returning all telephone calls from patients. (App. 12a) On September 9, 1987, after only three working days of preparation, as a result of the Labor Day holiday on September 8, 1987, and one hour of proceedings, Brayshaw was effectively suspended from practice pending a full evidentiary hearing.[1] (App. 13a)

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[1] The Board did set forth a series of conditions whereby Brayshaw could regain her license. These conditions, however, mandated, *inter alia*, that Brayshaw forgo all use of Synthroid, and thus would have destroyed the essence of her practice. Petitioner's several attempts to propose an acceptable plan that would delineate when Synthroid *could* be prescribed were summarily rejected.

Brayshaw's case was transmitted to the Office of Administrative Law on September 30, 1987. (App. 4a) She appealed the interim suspension order, and after a four-hour hearing before a committee of Board members on October 21, 1987, the committee voted to maintain Brayshaw's suspension. The full Board subsequently affirmed that recommendation on November 18, 1987. (App. 4a) Brayshaw's motions to the New Jersey Superior Court Appellate Division ("Appellate Division") for interlocutory review of the interim suspension on November 2, 1987 and December 9, 1987 were denied (App. 4a), in part, on the strength of the State's assertions that the issues would shortly be resolved at the evidentiary hearing. On December 16, 1987, the State opposed, and the Board denied Brayshaw's request for an accelerated hearing, made pursuant to N.J.A.C. 1:1-9.4.

The State supplemented the complaint twice (App. 4a, 13a) with numerous redundant additional counts (App. 51a), which ultimately resulted in delaying the final decision until February 14, 1990, some two and one-half years later. The State repeatedly refused Brayshaw's offers of a stipulation, by which only six cases would be tried, and a finding obtained as to any *one* of the six would be stipulated by Brayshaw as to *all* cases. Accordingly, the process grew ever more protracted.

The hearing began on November 30, 1987 and concluded on April 18, 1989. (App. 4a) During the 311 hearing days available over that seventeen month period, only fifty-six were utilized. (App. 13a) Allowing for weekends and holidays, the ALJ conducted seventeen hearing days of a possible forty-one available days between November 30 and January 31, 1988, at which time the ALJ adjourned the hearing until March 1, 1988. From March 1 to May 20, the ALJ resumed the hearing for only nine of the forty-five available hearing days.

On May 2, 1988, Brayshaw's counsel, overwhelmed by the bulk of repetitious counts, the pace of the process, and Brayshaw's depleting funds, moved to withdraw from the case. The Board denied his motion and appeal in mid-June, and the ALJ refused a stay to allow him to pursue further appeals. (App. 13a) Nevertheless, the ALJ postponed continuation of the hearing until October 11, 1988, for vacations and the ALJ's educational leave.

On October 13, 1988, Brayshaw's counsel failed to appear at the hearing, and she was ultimately forced to continue her defense *pro se*.[2] (App. 13a)

The hearing resumed on January 9, 1989. Between January 9 and April 18, twenty-three hearing days were utilized out of seventy available working days. The ALJ denied Brayshaw's request that the hearing be conducted on continuous days so that Brayshaw's burden in travelling from California, her new home, could be alleviated.[3] As a result, Brayshaw had to make four separate trips from California in an effort to attend the hearing, and she still missed substantial portions of it. The hearing concluded on April 18, 1989, seventeen months after it had begun. (App. 13a)

Throughout the hearing, Brayshaw was subjected to an egregiously unfair standard of discovery. Although the ALJ compelled production of her records, the ALJ deprived Brayshaw of virtually all access to the records of complaining witnesses compiled by other treating physicians on the basis of physician-patient privilege. (App. 51a-52a) Consequently, Brayshaw was prevented from effectively cross-examining the witnesses testifying against her and could not substantiate her arguments that the mild health effects of the witnesses either preexisted the Synthroid treatment or were due to medication prescribed by other physicians.

As a result of two rulings described below, Brayshaw could neither prepare for cross-examination of patient-witnesses nor adequately prepare her own expert witness to challenge the

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[2] Petitioner's husband filled in for two months *pro hac vice* (App. 13a), but Brayshaw ultimately released him so that he could continue to support the family. Although Brayshaw and her husband sought to retain local counsel, the ALJ barred appearance by an attorney who agreed to appear on Brayshaw's behalf but not to take responsibility for the case.

[3] Petitioner moved to California on February 16, 1988, so that her husband could obtain work to support the family. Despite her intention to be present to conduct her *pro se* defense, Brayshaw was forced to miss some of the testimony as a result of the erratic scheduling of trial days. Wary of adding to the delay, Brayshaw agreed to waive cross-examination on the days that she could not appear so that the hearing could proceed in her absence.

charges against her. First, the ALJ devised a scheme of *in camera* review of a few records, through which Brayshaw was given access to a very limited number of documents supplied by the State, prescreened by the ALJ, and deemed "highly relevant".[4] The records of certain kinds of physicians, for example, obstetrician/gynecologists, were excluded as a class from production, despite the fact that most of Brayshaw's patients had come to her with complaints of premenstrual syndrome. Petitioner received only a small fraction of the requested records from the ALJ. At the same time, the State was allowed to subpoena Brayshaw's patient records without limitation.

Second, the ALJ instructed the State to request the medical records of other treating physicians for the ALJ's review. Very few records were produced for the ALJ's inspection, however, and, aggrieved by this situation, Brayshaw sought to subpoena the missing records on her own. The ALJ impeded this process by directing Brayshaw to attach to each subpoena a letter stating that the subpoenas were unenforceable and had been objected to by the State. In response to over fifty subpoenas, only one set of records was delivered.

At this point, frustrated in the effort to obtain the records of other physicians vital to her defense, Brayshaw was compelled to waive cross-examination on the days that she did not appear so that the hearing could be expedited. Brayshaw at all times expected to recall certain witnesses if and when her discovery requests were granted, but they were not.[5]

2. *The Decisions Below*. According to N.J.S.A. 52:14B-10(c), the ALJ was required to file an initial decision within

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[4] This unprecedented *ad hoc* standard was invented by the Board in its decision of December 22, 1987 approving the ALJ's denial of access by Brayshaw to certain patient records.

[5] The State will undoubtedly argue that Brayshaw waived cross-examination and thus forfeited any claim of unfairness before this Court. In fact, the procedure that Brayshaw relied upon was identical to that which her original counsel had employed; counsel had expressly reserved cross-examination pending his receipt of requested physicians' records. Only after months of frustrated discovery requests did Brayshaw forgo cross-examination, and then, only

forty-five days after the hearing. (App. 14a) Although the ALJ received a one-month extension (App. 14a), the decision was not filed until September 1, 1989, over four months after the conclusion of the hearing. (App. 4a) The Board delayed the process even further, rendering an oral decision on November 8, 1989, and a final decision on February 14, 1990, ten months after the end of the evidentiary hearing. (App. 55a)

While the complaint primarily alleged that Brayshaw had been negligent in prescribing high dosages of Synthroid without first undertaking physical examinations of her patients, the Board ultimately suspended Brayshaw for inadequately coordinating her treatment with her patients' internists and for relying on office staff to return phone calls. Both the ALJ and the Board concluded that Brayshaw had not been negligent in the dosages of Synthroid that she had prescribed. (App. 7a-8a)

In his initial decision, the ALJ found that Brayshaw had been negligent as charged in seventeen of the counts. (App. 4a) He did not find Brayshaw negligent for failing to obtain physical examinations of her patients prior to prescribing Synthroid, because he drew a distinction between the standards applicable to psychiatrists and endocrinologists and accepted that psychiatrists rarely conduct physical examinations. The ALJ recommended that no further suspension be added to the two-year suspension already served by Brayshaw. (App. 4a) He concluded that Brayshaw should be reinstated to her practice upon compliance with a series of conditions. (App. 4a)

The Board disagreed with the ALJ's evaluation of the failure to obtain physical examinations claim. In finding Brayshaw negligent for failing to ascertain that physical examinations had been performed, the Board found an additional thirteen counts of negligence against Brayshaw. (App. 7a) In addition, the Board rejected the penalty suggested by the ALJ, imposing instead a

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because it would have been meaningless due to the State's denial of her discovery. Moreover, Brayshaw sought the records for the further purpose of permitting her expert witnesses to give informed testimony in her defense—a purpose that was similarly frustrated, thereby destroying Brayshaw's defense entirely.

suspension of Brayshaw's license to practice medicine and surgery for a period of five years effective September 23, 1987, and conditioning any future practice on her abandonment of the use of Synthroid, thereby eliminating the competition her practice posed for the local endocrinologists. (App. 55a-56a) While the Board created a process by which Brayshaw could resume practice, even during the suspension period, this mechanism consisted of acceding to many detailed conditions, (App. 6a) compliance with which, taken together, would have destroyed Brayshaw's specialty. The Board further mandated that in order to resume the practice of medicine in the State of New Jersey after completion of the entire suspension period, Brayshaw would have to request reentry and stipulate to all of the same conditions. (App. 6a)

Petitioner appealed the Board's decision, seeking reversal on the grounds that it was arbitrary, capricious, against the preponderance of the evidence, contrary to the laws of New Jersey, and violative of her right to procedural due process under the Fourteenth Amendment of the Constitution of the United States.[6] (App. 9a) In a *per curiam* decision, the Appellate Division summarily rejected all of Brayshaw's contentions. (App. 2a-11a)

On the timeliness issue, the court condoned the two and one-half year delay on the basis of the brief period of time occasioned by the withdrawal of Brayshaw's first counsel and the delay the court imagined had accompanied her move to California.[7] (App. 10a) The court concluded: "As to the unfortunate length of time that the temporary suspension [hearing] lasted, appellant steadfastly refused to accede to the seemingly reasonable conditions under which she could have continued her practice"—ignoring the fact that those conditions would have

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[6] Brayshaw raised both the unconscionable delay and the discovery issues below as violations of the Due Process Clause of the Fourteenth Amendment of the Constitution. As hereinafter discussed, the Appellate Division passed on both claims, albeit in a cursory and highly unsatisfactory fashion.

[7] There was no delay attributable to Brayshaw's move to California. The withdrawal of Brayshaw's counsel, caused by the gratuitous expansion of redundant counts against her, consumed at the very most three months—or ten percent—of the two and one-half year hearing.

destroyed her practice. (App. 10a) Notwithstanding serious delay and the State's failure to account adequately for lost time, and without considering the controlling precedent of *Barry v. Barchi*, 443 U.S. 55 (1979), the court summarily affirmed the Board's decision, finding that "procedural fairness . . . is assured through the framework of the contested agency case". (App. 10a)

The court similarly failed to confront the denial of Brayshaw's access to evidence necessary for cross-examination of adverse witnesses and presentation of a meaningful defense. (App. 10a) The court satisfied itself with the irrelevant observation that the State's administrative complaint adequately disclosed the nature of the charges against Brayshaw. (App. 10a) This conclusion, of course, wholly missed the point of Brayshaw's complaint, which was not that she was ignorant of the charges against her, but that she had been deprived of the evidence necessary to cross-examine adverse witnesses and to substantiate her view that the witnesses' symptoms were due to causes other than the prescription of Synthroid. The lower court thereby refused to deal with Brayshaw's actual grievance and rubber-stamped the conclusion of the State's unfair administrative procedures.

On March 24, 1992, Brayshaw's petition for certification to the Supreme Court of New Jersey was denied. The decision of the Supreme Court was entered on March 26, 1992. (App. 1a)

REASONS FOR GRANTING THE WRIT

The opinion of the Appellate Division presents this Court with three distinct issues worthy of review.

First, the Appellate Division condoned the protraction of a post-suspension hearing for a period well outside this Court's due process limits as enunciated in *Barry v. Barchi*, 443 U.S. 55 (1979), and simply refused to address the real reasons for the delay, excusing the State by reliance upon developments beyond Brayshaw's control that accounted for only a miniscule portion of the delay. (App. 10a) *Second*, the Appellate Division effectively placed the entire burden of proving unjustifiable delay on Brayshaw (App. 10a), in contravention of the standard set forth

by this Court in *Barchi*. *Id.* The allocation of the burden of proof in this context is an issue that has generated conflict in federal and state courts. By granting this petition for *certiorari*, this Court can clarify the burden of proof in cases involving such denials of procedural due process and provide reliable guidance to lower courts in protecting the due process interests of licensees in prompt post-suspension hearings. *Third*, the decision of the Appellate Division completely failed to deal with the State's deprivation of Brayshaw's right to evidence necessary to the cross-examination of hostile witnesses and the presentation of a meaningful defense. (App. 10a) In doing so, the court approved the application of the physician-patient privilege in a manner inconsistent with Brayshaw's due process rights. The decision below, therefore, affords this Court the opportunity to clarify the relationship between that privilege and an individual's right to evidence necessary to confrontation and cross-examination in an administrative proceeding.

1. *A Delay of over Two and One-half Years Between Initial Suspension and Final Disposition Exceeds the Delays Countenanced by Any Court in Post-Suspension Hearings.* A license to practice medicine undeniably falls within the range of property interests given the full protection of the Due Process Clause by this Court in *Bell v. Burson*, 402 U.S. 535, 539 (1971). Indeed, since suspension of a professional license may deprive an individual of her livelihood, a license has been considered a property interest even more worthy of due process protection than most government entitlements. *See*, Henry J. Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267, 1297 (1975). Recently, the Court in *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230 (1988), reaffirmed the principle that an individual's interest in continued employment is "without doubt an important interest that ought not be interrupted without substantial justification". *Id.* at 242. In Brayshaw's case, the Appellate Division completely disregarded her "important interest" by condoning the process to which she was unfairly subjected.

Between Brayshaw's initial suspension on September 9, 1987 and the Board of Medical Examiners' Final Decision and Order of February 14, 1990, two and one-half years elapsed.

(App. 9a) Assuming a conservative number of twenty weekdays per month, and subtracting a generous fourteen workdays per year for holidays, from the beginning of the hearing on November 30, 1987 to the end of the hearing on April 18, 1989, there were approximately 311 possible hearing days. Of these, only fifty-six were actually used. (App. 13a)

Since *Fusari v. Steinberg*, 419 U.S. 379 (1975), this Court has recognized that a prompt post-suspension hearing provides a constitutionally necessary check on errors made in the initial suspension decision. 419 U.S. at 389. The Court observed in *Mackey v. Montrym*, 443 U.S. 1 (1979), that the unreasonable protraction of the post-suspension process does more than burden the individual whose professional license has been summarily suspended; it also renders infirm the pre-suspension procedures employed by the state. *Id.* at 13. In *Barry v. Barchi*, 443 U.S. 55 (1979), the Court held that after an initial suspension the licensee's interest in a speedy resolution becomes paramount, and the state's interest in delay minimal. *Id.* at 66. Observing the often severe consequences of temporary deprivation, the Court in *Barchi* found a statute unconstitutional because of its failure to assure the licensee a prompt post-suspension hearing. *Id.*

Courts have repeatedly been confronted with egregious episodes of post-suspension delay since these early pronouncements by the Supreme Court. Although this Court has appropriately declined to define any absolute limit in determining when a delay is unconstitutional, preferring instead a fact-specific approach, no court construing the *Barchi* rule has ever upheld a delay as long as that experienced by Brayshaw in the context of a "temporary" pre-hearing loss of employment. *See, e.g., Mallen*, 486 U.S. 230, 245 (delay of ninety days is not a due process violation); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985) (nine months is not unconstitutionally lengthy *per se*); *Eguia v. Tomkins*, 756 F.2d 1130, 1140 (5th Cir. 1985) (delay of fourteen months, if unsupported by legitimate state rationale, is unconstitutional); *Gershenfeld v. Justices of the Supreme Court of Pa.*, 641 F. Supp. 1419, 1426 (E.D. Pa. 1986) (unexplained delay of from six months to two years violates the Due Process Clause); *Ampuero v. Board of Medical Examiners*, 410 So.2d 213,

214 (Fla. 1982) (delay of six months after suspension of physician is unconstitutional).

In this case, Brayshaw was forced to endure delay for vacations, delay for educational leave, delay due to scheduling difficulties, and wholly unexplained delays. Although New Jersey law purported to limit the length of time between the conclusion of the ALJ hearing and the date of decision, *see* N.J.S.A. 52:14B-10(c) (App. 14a), as in *Barchi*, 443 U.S. at 59, and *Gershenfeld*, 641 F. Supp. at 1424, New Jersey law did not prescribe any time limit for the post-suspension hearing itself. *See* 52:14B-11. (App. 61a) Throughout the process, Brayshaw suffered a situation fraught with grave consequences, as her life's work was literally destroyed. *See Mallen*, 486 U.S. at 243 ("We have repeatedly recognized the severity of depriving someone of his or her livelihood."). Browbeaten by the process, Brayshaw nevertheless attempted to accelerate it. Her requests to expedite the hearing, her attempts to alleviate the overwhelming bulk of repetitious counts by offering reasonable stipulations, and her entreaties for continuous hearing days, however, were all denied. In violation of Brayshaw's right to procedural due process, the courts of New Jersey upheld a delay much more serious and protracted than any sanctioned by the courts of this country—without ever seriously addressing the reasons for that delay.

2. *The Decision Below Improperly Imposed on Petitioner the Burden of Proof Relating to the Post-Suspension Hearing Delay.* This Court has never squarely addressed the burden of proof applicable to due process claims arising from post-suspension delay. But, as discussed in detail below, in applying *Mathews v. Eldridge*, 424 U.S. 319 (1976), to allegations of unconstitutional delay, the Court has suggested an allocation of the burden of proof that requires the government to justify its reasons for delay. By contrast, the Appellate Division, in assessing Brayshaw's claim, placed the burden of proof entirely on Brayshaw, never once inquiring into the State's responsibility or justification for the unnecessarily extended proceeding. (App. 10a) Because the Appellate Division decision is only one of a number of lower court decisions that have divided on the question of the burden of proof under *Barchi* and its progeny, *see*

pp. 17-18, *infra*, Brayshaw urges this Court to grant the petition for *certiorari*.

Since 1965, this Court has recognized that procedural due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner" in connection with the potential seizure of property interests. *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965). In *Barchi*, the Court struck a balance between the legitimate interests of the state and the interests of the licensee in a full evidentiary hearing to give effect to the "meaningful time" language. 443 U.S. at 66. Acknowledging that the state could have an important interest in immediate suspension, the Court authorized the state to impose an interim license suspension on a finding of probable cause. *Id.* at 63.

The Court conditioned its holding, however, on the provision of a prompt post-suspension hearing. The Court held that after a temporary suspension, the interests of the licensee in a speedy resolution on the merits become paramount. *Id.* Noting that the state had suggested no interest in an appreciable delay, and that the state itself had an interest in an early and reliable determination on the merits, the Court found a statute that failed to provide for a prompt hearing fatally defective. *Id.*

Before a state must offer justification for delay, the licensee has the burden of proving a prima facie case that the process has been unreasonably protracted. In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), the delay in a post-suspension hearing withstood constitutional challenge because petitioner failed to allege that the length of time had been unreasonably prolonged. *Id.* at 547.

Once petitioner has made a prima facie showing, this Court has placed a significant burden of proof on the state to justify the delay. In both *Barchi* and *Mallen*, the Court relied on the state to affirmatively and specifically articulate the interests claimed to supersede the paramount interests of the suspended individual in a prompt hearing. Thus, the *Barchi* Court observed and found dispositive the fact that the state had suggested no interests justifying appreciable delay. 443 U.S. at 66. In *Mallen*, the Court reiterated the importance of the government's burden, setting

forth "the justification offered by the Government for delay and its relation to the underlying governmental interest" as a crucial factor. 486 U.S. at 242. In the context of post-suspension delay, this Court has required some showing on the part of the state that its interests outweigh the grave interests of the individual in a prompt disposition.

Taken together, this Court's precedents suggest that petitioner bears the burden of establishing excessive delay, and on satisfaction of this requirement, that the state bears the burden of establishing compelling justifications for the delay that override petitioner's interest in timely adjudication. Virtually every timeliness decision rendered by this Court has affirmed and underscored the principle that the state must advance compelling justifications for unseemly delay. *See Barchi*, 443 U.S. at 66; *Mallen*, 486 U.S. at 242.

Petitioner in this case met her burden handily by alleging not only delay, but also severe prejudice incurred by the protraction of the process. After five months of scattered hearing days, the addition of many new counts, and accumulated attorney's fees approaching $125,000, which she could not continue to afford, Brayshaw's first counsel withdrew from her representation in frustration. (App. 13a) Brayshaw concluded the hearing a year later with no patients, no means of livelihood, a rapidly depleting fund from which to pay legal fees, and no assistance from an attorney.

In its opinion, the Appellate Division accepted Brayshaw's argument that the hearing proceedings had been "unduly protracted and extremely expensive". (App. 10a) The court dismissed Brayshaw's constitutional arguments, however, by concluding that much of the delay had been occasioned by Brayshaw's difficulty with her counsel and her move to California.[8] (App. 10a) In so holding, the court simply assumed,

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[8] The court bolstered its argument by reasoning that Brayshaw could at any time have acceded to the "reasonable" conditions for reentry imposed by the Board. These conditions, however, required Brayshaw to cease prescribing Synthroid, and would thereby have destroyed her innovative practice. In any event, an unconstitutional process cannot be justified by judicial minimization

without basis, that Brayshaw's move to California had delayed the proceeding, and gave undue weight to a brief delay caused by counsel's motion to withdraw. This delay, itself occasioned by the multiplicity of repetitive counts faced by Brayshaw, does not begin to explain a hearing protracted for two and one-half years. Despite the lack of any justification by the State for the significant periods of unexplained delay, the court found Brayshaw's interest in prompt resolution unworthy of protection. (App. 10a)

Notwithstanding plain indications from this Court that the state bears the burden of rationalizing unreasonable delays, once established by appellants, federal courts have joined the Appellate Division in unduly burdening the individual licensee. At present there exists substantial conflict among the lower courts as to the burdens borne by individuals in proving a case of unconstitutional delay.

The United States Court of Appeals for the District of Columbia, for instance, found no violation of due process because of the absence of evidence that the governmental agency had deliberately delayed the proceedings. *See Givens v. United States R.R. Retirement Bd.*, 720 F.2d 196 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 870 (1984). In *Givens*, the court required proof by the individual of intentional delay, thus departing from the balancing test set forth in *Mathews*. *Id.* at 201. Notwithstanding this Court's recognition of the licensee's paramount interest in a speedy resolution after an initial suspension, the court found no due process violation in an utterly unexplained, unreasonably protracted delay of one year and one-half, on the grounds that the plaintiff had failed to prove that the delay was purposeful.

The courts in *Gershenfeld v. Justices of the Supreme Court of Pa.*, 641 F. Supp. 1419 (E.D. Pa. 1986), and *Eguia v. Tompkins*, 756 F.2d 1130 (5th Cir. 1985), by contrast, construed the *Barchi* line of cases to require the state to affirmatively demonstrate legitimate reasons for delay in affording post-suspension

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of the consequences of an administrative suspension of a professional license. Moreover, Brayshaw attempted on several occasions to resolve her dispute by acquiescing in every restriction imposed by the Board other than its ban on the prescription of Synthroid, to no avail.

hearings. The court in *Gershenfeld* rejected the state's proffered rationales, explicitly deeming the excuses of new complaints and additional investigation to be insufficient. 641 F. Supp. at 1426. In the absence of compelling state interests justifying delay, the court in *Gershenfeld* found for the licensee and the court in *Eguia* reversed the state's summary judgment order. *See Gershenfeld*, 641 F. Supp. at 1426; *Eguia*, 756 F.2d at 1141.

The conflict between courts on the burden of proof for unconstitutional delay is not a question of semantics. Requiring the licensee to prove the absence of legitimate rationales on the part of the state severely undermines the protections provided by this Court in *Barchi*. Unless this Court resolves the conflicting approaches taken by the lower courts, individuals like Brayshaw will be deprived of their due process rights by careless burden shifting, like that implicit in the Appellate Division's cavalier disregard of the actual reasons for the protracted hearing in this case.

3. *The Denial of Petitioner's Discovery Requests Violated Her Right to Meaningful Cross-Examination Secured by the Due Process Clause.* In essence, the Administrative Complaint charged that certain of Brayshaw's patients suffered minor side effects from her prescription of Synthroid. (App. 12a) Throughout the hearing, Brayshaw sought access to specified records of other physicians that would prove that these alleged symptoms were due to other causes. Because Brayshaw was denied access to the vast majority of these documents, she was unable to formulate any case at all in her own defense.

Brayshaw's discovery requests were critical to her effort to withstand the forces of jealous peers mounted against her and to vindicate her professionalism. The atmosphere of the proceeding below resembled in many respects that in *Greene v. McElroy*, 360 U.S. 474, 496 (1959), in which the evidence was found to consist of "the testimony of individuals whose memory might be faulty or who, in fact, might be . . . motivated by malice, vindictiveness, intolerance, prejudice or jealousy." In this context, Brayshaw's ability to respond to and refute the testimony of psychiatric patients and experts recruited by her accusers was crucial to her defense.

Cross-examination is widely recognized as "the greatest legal engine ever invented for the discovery of truth". 5 John Henry Wigmore, Evidence § 1367 (1974). As this Court observed in *Davis v. Alaska*, 415 U.S. 308 (1974), "cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested". *Id.* at 316. In *Greene v. McElroy*, 360 U.S. at 497, this Court recognized the right to cross-examine witnesses in the administrative context: "This Court has been zealous to protect these rights from erosion." *Id.*

With the right to cross-examination has come an obligation on the part of the state to provide access to certain information. In *Greene*, this Court held that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue". *Id.* at 496. Some state courts construing the Constitution have been even more expansive, finding that the state has an obligation to disclose all possible exculpatory information on a showing of need and specificity. *See, e.g., Shively v. Stewart*, 421 P.2d 65, 68-69 (Cal. 1967) (en banc); *Montgomery v. Dep't of Registration and Educ.*, 496 N.E. 2d 1100, 1102 (Ill. 1986).

A deprivation that seriously impacts upon an individual's right to cross-examination should be evaluated in accordance with the *Mathews v. Eldridge* balancing test. *See Central Freight Lines, Inc. v. United States*, 669 F.2d 1063, 1068 (5th Cir. 1982). Under any reasonable application of that test to the facts of this case, Brayshaw's due process rights have been violated. The ALJ denied Brayshaw's requests for access to other treating physicians' records of testifying patients on the basis of physician-patient privilege. This rationale represents a serious deviation from the Court's view of privileges, one which should not be countenanced by the Court in this case.

In *United States v. Nixon*, 418 U.S. 683 (1974), this Court circumscribed the use of evidentiary privileges, holding that they "are not lightly created nor expansively construed, for they are in derogation of the search for the truth". *Id.* at 710. Five years later, the Court observed that "[e]videntiary privileges in litigation are

not favored". *Herbert v. Lando*, 441 U.S. 153, 175 (1979). In federal courts construing federal law, the physician-patient privilege has had a mixed reception. *Compare United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1982) (no privilege exists); *United States v. Meagher*, 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976) (rejecting privilege), *with In re Zuniga*, 714 F.2d 632, 639 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983) (accepting existence of privilege); *Doe v. United States*, No. 91-1467, 1992 WL 1144 38, *3 (2d. Cir. June 1, 1992) (finding privilege while recognizing its limited nature).

Brayshaw's interests in receiving records of specified treating physicians were of utmost importance, since disproving the testimony of hostile witnesses mounted against her was crucial to vindicating her name and her practice. By condoning the ALJ's denial of access to medical records crucial to Brayshaw's defense, (App. 10a) the Appellate Division decision raised an important question not yet resolved by this Court—whether a privilege expressly limited by this Court for its tendency to obscure the truth can be used in a license suspension proceeding to effectively deny cross-examination and meaningful rebuttal. Resolution of this question is essential for the vindication of Brayshaw's due process rights.

Beyond the broad question of the availability of the physician-patient privilege to bar the introduction of evidence vital to Brayshaw's case, there are further reasons why the ALJ's resolution of the privilege question was constitutionally improper in this case. First, by testifying against Brayshaw about the alleged health effects they suffered from Synthroid, patients arguably placed their medical conditions at issue, *see Huzjak v. United States*, 118 F.R.D. 61 (N.D. Ohio 1987), and thus waived their privilege. Accordingly, no state interest justified the denial of crucial evidence at all. Second, the ALJ deprived Brayshaw of her due process rights by selectively enforcing the physician-patient privilege against Brayshaw, while not so limiting the State when it sought Brayshaw's medical records of the same patients. Whatever constitutionally permissible role there may be for such a privilege in general, it was clearly applied in this case in a manner that deprived Brayshaw of her due process rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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June 24, 1992

Attorneys for Petitioner

APPENDIX

SUPREME COURT OF NEW JERSEY
C-742 September Term 1991
34,792

IN THE MATTER OF THE SUSPENSION
OR REVOCATION OF THE LICENSE OF
NORA D. BRAYSHAW, M.D.
TO PRACTICE MEDICINE AND SURGERY
IN THE STATE OF NEW JERSEY.

ON PETITION FOR CERTIFICATION

(Nora D. Brayshaw - Petitioner)

FILED
MAR 26 1992
/s/ Stephen W. Townsend
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2782-89T1 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the within appeal in this matter is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 24th day of March, 1992.

I hereby certify that
the foregoing is a true
copy of the original
on file in my office.

/s/ Stephen W. Townsend

CLERK OF THE
SUPREME COURT
OF NEW JERSEY

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2782-89T1

IN THE MATTER OF THE SUSPENSION OR REVOCATION OF THE LICENSE OF

NORA D. BRAYSHAW, M.D.

TO PRACTICE MEDICINE AND SURGERY IN THE STATE OF NEW JERSEY.

ORIGINAL FILED
JAN 14 1992
Emille R. Cox, Esq.
Clerk

Argued December 3, 1991 - Decided JAN 14 1992

Before Judges Michels, O'Brien and Havey.

On appeal from the final decision of the New Jersey State Board of Medical Examiners.

Allan H. Starr and Donna L. Freidel argued the cause for appellant (White & Williams, attorneys; Mr. Starr and Ms. Freidel, on the brief).

Joan D. Gelber, Deputy Attorney General, argued the cause for respondent (Robert J. Del Tufo, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Ms. Gelber, on the brief).

PER CURIAM

Nora D. Brayshaw, M.D., appeals from an order of the New Jersey State Board of Medical Examiners (Board) suspending

her license to practice medicine and surgery in the State of New Jersey for a period of five years on certain terms. We affirm.

Appellant practiced biological psychiatry. She has a Ph.D. in biochemical genetics from Columbia University and a medical decree from Stanford University, where she interned in medicine and pediatrics and served a residency in psychiatry. She served as a staff psychiatrist at Fair Oaks Hospital prior to opening her own private practice in the fall of 1984.

According to appellant, the focus of biological psychiatry is to look for underlying medical reasons for emotional disorders, *i.e.*, to look for chemical imbalances as causes of emotional problems. Although appellant had prospective patients fill out a questionnaire and her initial interview lasted approximately an hour and a half, she conceded she never performed any physical examinations of her patients. She relied upon her patients' statements regarding their last physical.

On September 2, 1987, the Board filed a 29-count verified complaint against appellant seeking to suspend or revoke her license on various grounds including deceptive conduct, repeated acts of malpractice, gross malpractice, and violation of Board regulations with respect to 26 patients. On September 11, 1987, appellant filed a *pro se* answer to the complaint denying all wrongdoing. On September 11, the Attorney General moved for an order temporarily suspending her license. The motion was accompanied by various exhibits including affidavits from 12 doctors referring to 22 of the patients, as well as affidavits from eight or nine patients.

After a hearing on September 19, at which appellant appeared without counsel, the Board temporarily suspended her license based on its finding of a clear and imminent danger. It entered an order to that effect on September 23, 1987. The temporary suspension barred appellant from prescribing Synthroid, but permitted her to practice on certain conditions, which appellant chose not to accept. Therefore, her license has remained suspended from September 23, 1987 to the present time.

The case was transferred on September 30, 1987 to the Office of Administrative Law (OAL). Appellant obtained counsel and moved for reconsideration of the Board's order of temporary suspension. A special hearing by a committee of the Board was held on October 21, 1987 at which appellant presented testimony of three expert witnesses. The committee recommended that the temporary suspension remain in effect. On November 18, 1987, the Board adopted the committee's recommendation. We denied appellant's motion for a stay and dismissed her appeal as interlocutory.

No useful purpose would be served in delineating the extensive procedural history of the case. Suffice it to say, the hearing before the Administrative Law Judge (ALJ) began on November 30, 1987 and continued intermittently for over 50 days, eventually concluding on April 18, 1989. On November 17, 1987, over appellant's objection, the Board had twice granted the Attorney General leave to supplement the Board's complaint, to the end that the total number of counts tried was 40.

The 177-page initial decision of the ALJ was filed on September 1, 1989. The ALJ found violations under the second, fourth, tenth, twelfth, thirteenth, fourteenth, fifteenth, seventeenth, nineteenth, twenty-sixth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-eighth, and fortieth counts. He recommended that no additional period of active suspension be added to the nearly two years of temporary suspension, which by that time had already been served. However, the ALJ did not recommend that appellant be automatically restored to active practice. Rather, he recommended that she be required to comply with the following conditions: (1) attend and complete courses in general medicine and endocrinology, and any other subject matter deemed appropriate by the Board; (2) present a plan for resumption of practice for approval by the Board, which would incorporate the following limitations: (a) an agreement not to prescribe thyroid medication unless the patient had been physically examined by another doctor within the preceding six months, who had certified the medication was not inappropriate; (b) an agreement not to change any therapeutic plan previously initiated by another doctor without first obtaining the consent of that

doctor; (c) an agreement to regularly provide her patients' primary care physicians with a record of her treatment whenever thyroid medication was prescribed, and an agreement not to continue any patient on thyroid medication for more than six months without a physical examination being conducted during that time; (d) an agreement to discontinue thyroid therapy upon request from any primary care physician; (e) an agreement to maintain a 24-hour answering service, to return all nonemergency calls within one business day, either personally or by someone on her behalf, and to return all emergency calls personally within 24 hours; (f) an agreement to retain copies of all laboratory reports and to not substitute references ranges utilized by the laboratory performing the testing unless appellant offers an explanation to her patients; (g) an agreement to provide her patients with a bill for each service rendered and to maintain copies of such; and (h) an agreement to retain raw data developed in connection with research studies performed by her. The ALJ also assessed to appellant the investigatory costs of $20,415.02, expert witnesses' fees of $33,883.75, and one-half the cost of transcripts. He also assessed a penalty of $17,000, representing $1,000 for each of the counts upon which the ALJ found her to have committed a violation.

In its 58-page final decision and order dated February 4, 1990, the Board accepted some of the recommendations of the ALJ and rejected others. It also rejected his recommended penalty. The Board agreed with the ALJ that revocation of appellant's license, as sought by the deputy attorney general, was inappropriate, but it did not agree with the "time served" model of discipline suggested by the ALJ.[1]

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[1] The Board rejected the ALJ's recommendation that appellant attend and complete certain courses, finding that "it is not that respondent has not been taught appropriate practice," but rather that she sees herself as exempt from having to "do it by the book." Thus, the Board did not require additional course work to be performed. Since the Board was convinced "that a more watchful approach is warranted to assure that [appellant] will comply with our directives," the Board concluded that her reentry into practice in New Jersey be permitted in a supervised setting. The Board concurred with the imposition of investigatory costs, expert witnesses' fees, and half of the cost of transcripts, but found the

The Board suspended appellant's license to practice medicine and surgery for a period of five years effective September 23, 1987, the first two and one-half years to be served as an active suspension with the balance to be stayed provided she comply with the "restraints, limitations and other terms" set forth in the order. Among those are that upon completion of the two and one-half years of active suspension, appellant present to the Board a proposal for reentry into practice of medicine in an institutional setting subject to supervision by a plenary licensed physician acceptable to the Board and subject to limitations and protocols as the Board may deem appropriate in the practice context. "The protocol proposed must assure that respondent makes sufficient effort to ascertain a patient's current physical status prior to the initiation or alteration of a therapeutic plan. That proposal must further assure that respondent collaborates with other treating physicians in the rendition of patient care and will be accessible and available to provide appropriate follow-up and emergent care to her patients."

The order provides that even if appellant chose not to avail herself of the option to reenter practice on or about March 23, 1990, the end of the active suspension, but any time during the remainder of the suspension period, she, nevertheless, "even upon completion of the entire period of suspension [must] submit a proposal for reentry for Board approval, before reentering the practice of medicine in this State.[2]

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imposition of penalties unnecssary. It also agreed to forego recoupment of monies paid by patients.

[2] At oral argument, we were informed that appellant chose not to avail herself of the option to reenter practice on the terms specified in the Board's order and that, in fact, she has moved to the state of California, where she is licensed to practice, pending disposition of this matter here in New Jersey.

The Board affirmed the dismissal of ten counts as recommended by the ALJ[3] and affirmed seven convictions.[4] The Board reversed the dismissal of thirteen counts[5] and modified ten counts.[6] The basis of the reversal of the dismissals recommended by the ALJ in 13 counts was the failure of appellant to obtain an adequate knowledge of the patients' physical condition before prescribing Synthroid. This difference of opinion emanated from the differing evaluations of the testimony of Dr. George Wilson, who testified on behalf of appellant. The Board noted, "Since Dr. Wilson's opinions were pivotal to Judge Weiss' decision, we have examined his testimony with great care. The Board concluded,

> [T]he ALJ has, in our view, misconstrued the import of Dr. Wilson's testimony, failing to recognize (1) that the prerequisites to safe practice which Dr. Wilson had assumed were undertaken here were, in fact, not provided, and (2) that Dr. Wilson had a misconception concerning the role which respondent was purporting to play for her patients and the interrelationship that existed (or did not exist) between respondent and other treating physicians. [The ALJ] also seems to have ignored the testimony of Dr. Selenkow, respondent's expert, and to a great extent he seems to have discarded the testimony of the State's witnesses.

The Board then undertook an analysis of Dr. Wilson's testimony as well as that of Dr. Sorvino, who testified on behalf of the State concerning the accepted uses of Synthroid in the treatment of psychiatric disorders. It recognized that all three testifying psychiatrists acknowledged that there are some appropriate uses for Synthroid in psychiatric patients and thus its use did not *per*

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[3] Counts one, three, six, twenty-four, twenty-eight, twenty-nine, thirty-five, thirty-six, thirty-seven, and thirty-nine.

[4] Counts four, twelve, thirteen, nineteen, twenty-six, thirty-eight, and forty.

[5] Counts five, seven, eight, nine, eleven, sixteen, eighteen, twenty, twenty-one, twenty-two, twenty-three, twenty-five, and twenty-seven.

[6] Count two, ten, fourteen, fifteen (reversing the ALJ's finding of gross negligence) seventeen, thirty (thirty-one, thirty-two, thirty-three and thirty-four were consolidated with thirty).

se violate any standard of practice. The Board also noted that, although it harbored reservations with regard to the dosages of Synthroid prescribed, "We recognize that such decisions are exquisitely sensitive to the particular patient's needs and responses, and thus we will not hold that the dosages prescribed were *per se* negligent." The Board then focused on the manner in which the medication was prescribed, noting that the endocrinologist who had testified for appellant at the hearing to reconsider her temporary suspension "had acknowledged the need for some contemporaneous assessment of the patients' physical status."

The Board acknowledged that in traditional psychiatric practice, physical examinations are not routinely performed, noting however that "appellant was purporting to provide neuroendocrine consultation, an activity which patients might logically expect to involve a physical." The Board then carefully examined the evidence concerning the need for a psychiatrist to obtain knowledge of the patient's physical condition on the basis of physical examinations performed recently by others.

We have carefully reviewed the testimony of Dr. Wilson and note that he was aware appellant was not acting as a traditional psychiatrist and that she held herself out in the psychiatric community as someone specializing in neuroendocrine aspects of psychiatric illness with special emphasis on the thyroid gland. He defined psychiatry as providing both psychological and medication management services. While there may be room for disagreement as to the thrust of Dr. Wilson's testimony, it was for the ALJ in the first instance, and for the Board finally to evaluate the conclusions to be drawn from that testimony.

We serve a limited role in reviewing decisions of an administrative agency. *Barry v. Arrow Pontiac, Inc.*, 100 N.J. 57, 71 (1985). We do not weigh the evidence, determine the credibility of witnesses, draw inferences or conclusions from the evidence, or resolve conflicts therein when reviewing determinations of the administrative body. *De Vitis v. New Jersey Racing Com'n.*, 202 N.J. Super. 484, 489 (App. Div.), *cert. denied*, 102 N.J. 337 (1985). Rather, our role is limited to surveying the record to determine whether there is sufficient credible evidence in the

record to support the conclusions of the agency. *Clowes v. Terminex Intern., Inc.*, 109 N.J. 575, 587 (1988); *Close v. Kordulak*, 44 N.J. 589, 599 (1965). We generally accord a strong presumption of reasonableness to an administrative agency's exercise of statutorily delegated responsibilities, and that presumption is even stronger where the agency has been delegated discretion to determine the specialized and technical procedures for its tasks. *In the Matter of Application of Pennsauken Solid Waste Management Authority* 238 N.J. Super. 233, 251-252 (App. Div. 1990); *Petition of Adamar of New Jersey, Inc.*, 222 N.J. Super. 464, 469-470 (App. Div. 1988). The decision of the administrative agency should not be disturbed unless it is arbitrary, capricious or unreasonable, or is not supported by substantial credible evidence in the record as a whole. *Henry v. Rahway State Prison*, 81 N.J. 571, 579-580 (1980). The daily practice of medicine concerns life and death consequences to members of the public. *In Re Polk License Revocation*, 90 N.J. 550, 571 (1982); *In Re Suspension of DeMarco*, 83 N.J. 25, 30 (1980).

On this appeal, Dr. Brayshaw argues she was denied due process in the temporary suspension of her license for an inordinate period of time. She claims to have been denied an effective hearing concerning the temporary suspension; she was denied the type of discovery permitted to the State; that the lengthy complaint against her was twice supplemented improperly; and that her hearing dragged on for two years. She claims the experts offered by the State would hold her to a standard of practice inapplicable to psychiatrists and, as noted, the Board improperly evaluated the testimony of Dr. Wilson in reaching its conclusion.

A license is in the nature of a property right, but is not a fundamental individual right, and as such is subject to reasonable regulation in the public interest. *In Re Polk License Revocation*, 90 N.J. at 570. In the case of a medical license, it is recognized that the nature of the private interest affected is substantial and that the potential deprivation is great. *Id.* at 565. The State, on the other hand, has a paramount obligation to protect the general health of the public. Hence, the right of doctors to practice their

profession is necessarily subordinate to this governmental interest. *Id.* In balancing the competing interests, the courts will look at, (1) the nature of the private interest affected; (2) the countervailing governmental interest; and (3) the risk of error in the ultimate determination created by the use of the particular burden of proof. *In Re Polk*, at 562, *citing Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L.Ed. 2d 18 (1976). Application of procedural fairness in an administrative adjudication is assured through the framework of the contested agency case. That is, risk of confusion, misunderstanding and error is at a minimum, as is the potential for subjective, discriminatory or arbitrary action. *In Re Polk*, at 567. Where a licensee has a full and fair opportunity to present witnesses in his or her own behalf, to cross-examine and rebut testimony and to present affirmative defenses, all before an objective fact-finder in the Office of Administrative Law, the requirements of due process will have been met. *De Vitis v. New Jersey Racing Com'n.*, 202 N.J. Super. at 500-501.

We recognize that Dr. Brayshaw has impressive credentials to practice her profession. We further recognize that the proceedings in this case were unduly protracted and extremely expensive, both to Dr. Brayshaw and to the public. However, much of the delay was engendered by Dr. Brayshaw's difficulty with her counsel and her move to California. Our review of this voluminous record leaves us with a sense of the overwhelming efforts by the ALJ to be fair and impartial and to afford Dr. Brayshaw every opportunity to meet the serious allegations of the complaint. The complaint itself was explicit as to the charges so that any deprivation of discovery does not appear to have been harmful. The sanction imposed for appellant's refusal to provide records appears to have been clearly warranted and, in any event, not to have greatly affected the outcome. As to the unfortunate length of time that the temporary suspension lasted, appellant steadfastly refused to accede to the seemingly reasonable conditions under which she could have continued her practice.

An administrative agency has broad discretion in determining the sanctions to be imposed for a violation of the legislation it is charged with administering. *Knoble v. Waterfront Comm. of N.Y. Harbor*, 67 N.J. 427, 431-432 (1975). Such a sanction will be set

aside on appeal only if it is arbitrary, capricious or unreasonable. *Matter of Scioscia*, 216 N.J. Super. 644, 660 (App. Div.), *certif. denied*, 107 N.J. 652 (1987). The five-year suspension imposed by the Board will terminate in approximately nine months. Under the terms of the order, appellant has the immediate right to present to the Board a proposal for reentry into practice under the terms set forth in paragraph two of the Board's order. Even upon completion of the five-year suspension, appellant is required to submit a proposal for reentry for the Board's approval. However, we do not read the Board's order to require that the proposal at that time be within the limitations and protocols required in connection with the proposal before the expiration of the full term of suspension. At this point, appellant has chosen not to submit a proposal for reentry and it remains to be seen whether, upon completion of the five-year term of suspension, she will choose to present some proposal for reentry. She will, of course, have a right to review the Board's action in connection with any proposal she may present at that time.

To the extent that we have not addressed the many specific procedural and substantive issues advanced by appellant, we find them to be without merit. *R.* 2:11-3(e)(1)(D)(E).

Affirmed substantially for the reasons given by the Board in its final decision resulting in the order of February 14, 1990.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ R. Emille Cox

Clerk

STATE OF NEW JERSEY
DEPARTMENT OF LAW &
PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
BOARD OF MEDICAL EXAMINERS
DOCKET NO.

IN THE MATTER OF THE SUSPENSION OR REVOCATION OF THE LICENSE OF NORA D. BRAYSHAW, M.D. TO PRACTICE MEDICINE AND SURGERY IN THE STATE OF NEW JERSEY	Administrative Action FINAL DECISION AND ORDER

This matter was opened before the New Jersey State Board of Medical Examiners by way of a Complaint and Notice of Motion for temporary restraints. On September 9, 1987, that complaint, then comprised of twenty-nine counts, alleged that respondent engaged in gross and repeated malpractice with respect to twenty-six patients over the period 1984 up through the date of the application, and that her continued practice would constitute a clear and imminent danger to the public health. In essence, the State alleged that the prescription of Synthroid, a synthetic thyroid hormone to the identified patients without a physical exam, at the dosages as alleged, constituted a substantial and repeated deviation from the standard of care. The complaint also alleged that respondent failed to be available to and respond to patients experiencing adverse symptoms and to appropriately monitor those patients. Additional charges related to the conduct of a laboratory in which respondent was a part owner along with her husband.

Respondent appeared before the Board on September 9, with her husband and elected to proceed *pro se*. Upon its consideration of the Attorney General's application and the papers respondent filed, as well as respondent's own testimony, the Board determined that her continued unrestricted practice would pose a clear and imminent danger to the public, and accordingly, entered an order placing temporary limitations on respondent's license, which limitations barred her from prescribing Synthroid but permitted her to practice under specified conditions. That determination has withstood a reconsideration motion before the Board, appellate review and a petition for reinstatement before the Administrative Law Judge at the close of the State's case, and remains in place to date.[1] Two supplemental complaints were filed during the course of the proceedings.

A hearing was conducted before the Office of Administrative Law, Administrative Law Judge Stephen Weiss presiding, for fifty-six (56) days, spanning from November 30, 1987 to April 18, 1989. During the first nineteen (19) days of trial respondent was represented by Steven I. Kern, Esq., who thereafter failed to appear as counsel, in contravention of an OAL order, upheld on appeal, denying his motion to withdraw. Thereafter respondent was represented, for a short time by her husband David Brayshaw, Esq., who was admitted *pro hace vice*. For the balance of the trial she was *pro se*, waiving appearances on many scheduled hearing dates. Post-hearing briefs were submitted by the parties and the record was closed on June 20, 1989. An Initial Decision was issued on September 1, 1989, which decision is incorporated herein by reference as if fully set forth herein.

Exceptions were received from respondent and complainant on September 25, 1989. Cross exceptions from respondent were

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[1] In his Initial Decision, Administrative Law Judge Stephen Weiss declined to "detail all of the matters which arose during the hearings and which explained in large part the reason it took so long to try the case" (Initial Decision) (hereinafter I.D. page 3). In light of the numerous procedural and legal challenges raised by respondent, such a detailed account is critical. Accordingly, a complete recitation of the torturous procedural history of this matter is appended hereto as Exhibit A and incorporated herein by reference as if fully set forth.

received on October 2, 1989. Cross exceptions from complainant were received on October 6, 1989. Because of the voluminous materials involved and the complexities of the issues presented, the Board recognized that it could not complete its review within the forty-five (45) days allowed by OAL and accordingly an extension of time was sought and obtained. The Board alerted the parties that it would begin its deliberations on October 11, 1989 and would thereafter advise counsel as to the issues on which it would entertain oral argument at the November meeting.[2] By letter of October 25, Michael B. Grossman, D.O. Board President noted for counsel the issues to be addressed at the argument scheduled for November 8, 1989. Although that letter had advised that no additional written materials would be accepted, Deputy Attorney General Gelber, in response to the letter request for a detailed chronology, offered a submission, which in the interest of facilitating the appearance, the Board agreed to accept. Respondent also mailed directly to the Board members an additional submission intended to be a reply to the cross exceptions filed by the State, which submissions were received on or about November 3, 1989.

At the final hearing date November 8, 1989, Mr. Cardonsky appeared on behalf of respondent. By way of his preliminary remarks, counsel informed the Board the respondent now resides in California and had determined not to attend the hearing. He also advised the Board that within the last month he had "come into this matter" conceding his lack of familiarity with the administrative case and the voluminous record.[3] Upon the conclusion of argument the Board renewed its deliberations. It subsequently reconvened in open session, announcing its decision as to each count on the record.[4] With respect to many of the

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[2] By letter dated October 6, 1989 the Board was advised that respondent would be represented at argument on exceptions by Robert Cardonsky, Esq. of the firm of Forman, Forman, Cardonsky, Andril and Ungvary.

[3] As Appendix B, attached hereto is a summary of the violations alleged, ALJ findings, and Board actions, as to each and every count.

[4] He stated for the record respondent's position that Steven I. Kern, Esq., Dr. Brayshaw's prior counsel, had a continuing obligation to represent her in this

counts, the Board determined to modify the ALJ's disposition, and, more importantly, it gave independent consideration to the expert testimony, according different import to the statements offered. The Board modified many of the underlying precepts which the ALJ had accepted, and in so doing, the Board has reached divergent conclusions.

Counsel for respondent was thereafter permitted to speak in mitigation of penalty. He reiterated the statements in respondent's own submissions with regard to the hardships which she has already endured as a result of the litigation. Complainant noted that throughout the litigation, respondent had failed to show any remorse for the conduct which had caused patients concern and had failed to recognize that her care of patients deviated from accepted standards of care. The Board considered those arguments and determined to modify the Administrative Law Judge's recommended penalty, as detailed in the final section of this decision.

EXPERT TESTIMONY

In his decision at pages 9 through 24, ALJ Weiss analyzed the testimony of the experts who appeared on behalf of the State and the respondent. Without making any unfavorable credibility findings as to any of the experts, Judge Weiss was clearly persuaded that the testimony of Dr. George Wilson was entitled to the greatest weight. Judge Weiss appears to have reached this conclusion because he found that Dr. Wilson hailed from a specialized field of medicine, more akin to that in which respondent practiced, and thus was more knowledgeable concerning the standards of practice in that field. Since Dr. Wilson's opinions were pivotal to Judger Weiss' decision, we have examined his testimony with great care. Judge Weiss has

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matter since Kern's motion to withdraw from the OAL proceeding had been denied and that determination was upheld by the New Jersey Supreme Court. Respondent maintained that Mr. Kern's failure to appear and represent her was in violation of a "court order", and placed her at a substantial disadvantage in her defense of the charges.

relied on Dr. Wilson's testimony to support his holding that psychiatrists need not always perform physical examinations, as well as his holding that psychiatrists need not respond personally to patients' queries. In making these determinations, the ALJ has, in our view, misconstrued the import of Dr. Wilson's testimony, failing to recognize (1) that the prerequisites to safe practice which Dr. Wilson had assumed were undertaken here were, in fact, not provided, and (2) that Dr. Wilson had a misconception concerning the role which respondent was purporting to play for her patients and the interrelationship that existed (or did not exist) between respondent and other treating physicians. Judge Weiss also seems to have ignored the testimony of Dr. Selenkow, respondent's expert, and to a great extent he seems to have discarded the testimony of the State's witnesses.

A review of Dr. Wilson's testimony, as well as that of Dr. Sorvino, a subsequent treating physician who testified on behalf of the State, does reveal that there are accepted uses for Synthroid in treatment of psychiatric disorders. Dr. Wilson identified those uses:

> "1. in treatment for depression as an adjunct to the use of antidepressant medications, both the tricyclic and the MAO inhibitor type;
>
> 2. in treatment of patients for whom lithium is being prescribed for cyclic bipolar or manic depressive illness;
>
> 3. in treatment of patients with "subclinical hypothroidism" and who had apathetic depressive symptoms and symptoms that were related to some psychological problems like pre-menstrual syndrome, migraine, etcetera, that was related to a low functional thyroid level" (49T-9 to 10).

Dr. Sorvino also recognized three uses to which psychiatrists might put Synthroid:

> 1. when a patient is "rapid cycling" (referring to rapid cycling bipolar disorder) and "you are using that experimental technique to turn off the rapid cycling";

2. when a patient is a "refractory depressive" and "you are adding the thyroid to bump the antidepressive higher on the brain";

3. when a patient is hypothyroid (39T-67).

Dr. Kriedman, another subsequent treating psychiatrist who testified on complainant's behalf also recognized that thyroid medications could be used by psychiatrists to treat thyroid disorders and to potentiate an antidepressant.[5]

Since all three testifying psychiatrists acknowledged that there are some appropriate uses for Synthroid in psychiatric patients, its use per se is not violate of any standards of practice. There was no consensus, however, that the use to which respondent put Synthroid in many cases herein — that is, the treatment of depression, PMS and anxiety — where the patient was characterized by her to have subclinical hypothyroidism, was acceptable; Dr. Wilson being the only practitioner accepting of such practice.[6] Even though Dr. Wilson was the only practitioner to accept this use we will not disturb Judge Weiss' recognition of a physician's latitude to make unusual and unconventional therapeutic choices. Although we continue to harbor reservations with regard to the dosages prescribed, we recognize that such decisions are exquisitely sensitive to the particular patient's needs and responses, and thus we will not hold that the dosages

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[5] He was unaware that massive doses of thyroid might be effective for treating psychiatric disorders (45T-37 to 38).

[6] Even Dr. Selenkow, respondent's testifying endocrinologist, noted that he found such use to be questionable. He stated:

> The third usage here that is probably the least defensible, but it is defensible in what I would call the non-specific use of thyroid.
>
> That is, an individual where you have no real evidence other than one laboratory stimulating test, the so-called TRH test, but the patient doesn't feel good and there you would get authorities and we would all probably disagree or agree that we couldn't get a consensus.

Dr. Selenkow, while acknowledging that he might disagree with respondent's treatment decisions, defended allowing her latitude to make those choices, so long as no harm would come to her patients.

prescribed were per se negligent, although we note there was considerable testimony suggesting the danger implicit in the dosages used and the pace at which those levels were attained.

We choose to focus, as we did at the very inception of this case, on the manner in which this medication was prescribed and pattern of patient mismanagement evidenced. In our order of temporary suspension made effective September 23, 1989, we wrote, "Without yet ruling on the merits of the therapeutic program which she has devised, the Board is deeply concerned that respondent is delivering that therapy in an unsafe manner" (p. 3). By our order of November 25, 1987, we declined to disturb the ordered temporary limitations, recognizing that her testifying endocrinologist had acknowledged the need for some contemporaneous assessment of the patients' physical status. In refusing to overturn the ALJ decision to deny her motion for reinstatement made at the conclusion of the State's case, the Board relied on Judge Weiss' interim determination that the evidence to date demonstrated that respondent "at times has placed her patients 'in a position of active or threatened harm'" (p. 4). We remain convinced of those initial conclusions and believe they are borne out by the totality of the evidence, including the testimony of Dr. Wilson.

Need For Physical Examination

Judge Weiss noted in his narrative recitation of the expert testimony, Dr. Wilson's view on the issue of the need for a physical examination:

> Dr. Wilson observed that physicians in private psychiatric practice rarely conduct hands-on physical examinations of psychiatric patients for a variety of reasons. A primary reason, of course, is the potential for creating anxiety in a patient who has consulted for psychological therapy and few psychiatrists in office practice even have the facilities for a full physical examination (ID, p. 16).

Dr. Brayshaw framed it as, "[i]n psychiatry, you're not supposed to be touching a patient" (ID, p. 7). While neither Drs. Wilson nor

Sorvino put it so categorically, it was clearly acknowledged that in a traditional psychiatric practice, physical examinations are not routinely performed by psychiatrists.[7]

Having reached that conclusion does not address the issue of whether a psychiatrist offering, thyroid therapy ought to see to it that a physical examination is performed.[8] Of course the endocrinologists who testified recognized the need for a physical examination prior to the initiation of thyroid therapy. While Dr. Selenkow questioned a psychiatrist's ability to perform such a physical, he presupposed that the psychiatrist would "rely on internists or the physician who referred it to them and if there's any doubt, let's say they don't trust the person they sent to for whatever reason to refer it to another person to corroborate" (Oct. 21T-75).

The psychiatrists testifying did not have a markedly different view. Dr. Kriedman testified that "[i]f a patient hasn't had a physical, I will insist that they have one before they see me or if I feel they need medication, to have one" (45T-59). He noted that most of his referrals come from fellow physicians. He further identified the need for baseline tests at the outset (45T-66), and personal visits, with additional testing, upon the onset of adverse symptoms (45T-29). Dr. Sorvino, while acknowledging that "[i]t is not traditional to do a psychiatric — a physical exam," recognized

> But as soon as we say that, there are many, many exceptions to that. That is when you see a patient, they usually have been referred by an internist or family practitioner who has just done a physical exam. If the

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[7] Of course, respondent was not acting as a traditional psychiatrist, providing psychological therapy. She was purportedly to be providing neuroendocrine consultation, an activity which patients might logically expect to involve a physical.

[8] We expressly reject respondent's suggestion that her mere observation of the patients, coupled with a handshake, will alert her to the presence of medical problems. Such an assertion simply flies in the face of conventional medical wisdom, and while some problems may be gleaned from casual observation, others are obviously not apparent.

> patient has a neurological disorder, I may do a quick neurological exam. If the patient has a thyroid disorder, depending on the suspiciousness, paranoia of the patient, I may or may not put my hands on their throat to feel for a thyroid.
>
> Because of the exquisite sensitivity of patient in a psychiatric office, as a male, I'm very cautious about touching a patient. I take blood pressures because I'm giving meds which affect blood pressure. I do various neurological testing, I may test reflexes but I'm very, very cautious.
>
> If the patient's in the hospital with a chaperone I do a complete physical (39T-69).

If a patient were to report chest thumping or rapid heart beat, Dr. Sorvino would inquire as to whether the patient had been seen by his physician, and in some circumstances he might do a "quick physical."

Upon our careful review of Dr. Wilson's testimony we believe that he too made certain presuppositions concerning the interactions which respondent had with treating physicians. He acknowledged the need for a psychiatrist to be aware of the patients' physical status. He noted that he would "rely" "on the fact the [his] patients who were being seen by other physicians who were doing such examinations for non-psychiatric purposes" (49T-29). Indeed he testified that with respect to those patients that he sees "in the public sector, I make, you know, [a] policy that patients if they haven't seen a general medical physician, is referred over to our medical clinic for an assessment contemporaneous with starting psychiatric treatment." In the private practice setting, as to patients in their late teens through middle age, he claimed that he would be satisfied if the patient had had a physical within the last six months to a year. He remarked that the need for a physical assessment might be even greater where there was no established diagnosis or known problem. The vast majority of Dr. Wilson's patients, he reported were referred to him by other doctors or had failed in treatment elsewhere. While he might rely on a patient account rather than delay

treatment, he noted that he might try to call the doctor and would send for the records. Indeed at the October 21, 1987 hearing, Dr. Wilson acknowledged with respect to patients complaining of chronic premenstrual syndrome he "would make sure that there was a physical examine pap smear, GYN work-up" (Oct. 21T-168). With respect to the prescribing of larger doses of Synthroid, he described his own experience.

> [I]f the endocrinologist and the psychiatrist agreed that some amount of thyroid was needed and there was a question as to what dose was, oh, yes, I've been in that position myself in which I've been *working collaboratively with an endocrinologist* . . . [emphasis added].

Taken as a whole we cannot read Dr. Wilson's testimony as an endorsement of respondent's pattern of practice. Many of the patients herein reported to respondent that their last physical had been conducted years before their visit. Some could not even recall when the last physical exam had been performed, placing a "?" next to the space on the out patient record sheet. In all but a very few instances, respondent appears to have made no effort to obtain reports or records from prior treating physicians. To our knowledge none of these patients were referred by physicians; many have been self-referred, referred by friends or a psychologist, who, by law, could not have performed a physical examination or be in a position to assess the consequences of reports of physical problems. Given this factual context, we believe respondent ought to have made an effort to assure that a contemporaneous physical examination had been performed by a responsible practitioner and that she was in possession of that assessment.

The Nature of Respondent's Practice and the Role She Purported to Play

Our conclusion above is even more evident when viewed in the context of respondent's practice. Respondent has proclaimed herself to be a bio-psychiatrist and represented to the patients who came to her that she was performing neuro-endocrine consultation.

In most cases she did not act as a traditional psychiatrist, although she did note in her records significant detail concerning her patient's social history. She did not offer psychotherapy and generally planned to see patients with insufficient frequency to serve that role. Since few, if any, patients herein were referred by physicians, these patients logically and legitimately assumed she was responsible for their care, and that she was the professional to whom they should turn when experiencing adverse symptoms. Respondent failed many of her patients in this regard.

As Dr. Selenkow noted, a physician is obligated to listen to a patient who may wish counsel even if that physician may believe that the patient's fears are unfounded, non-emergent or annoying. The Board is not suggesting that practitioners need drop everything when any call comes in, but relayed messages to patients describing chest pains and palpitations and the like be simply not acceptable; nor are letter responses. Not only was respondent obligated to personally respond to these patients, in some instances she ought to have assured that they were physically evaluated at that time to confirm the etiology of the symptoms being reported. Her attempts to deflect patients, announcing that she was merely a consultant, belied the actualities of the relationships she was establishing. In those cases where patients were being referred by psychologists, she may have been operating as a consultant — but she was the consultant prescribing medication, presumably with knowledge concerning the patients' physical status and the anticipated physiological responses. We are unaware of any cases where she was operating as a consultant to a primary care physician or internist who would have been in the position to deal with sequelae of her treatments. We believe that Dr. Wilson has misconstrued the "limited" role that he believed respondent to be playing, perhaps because his opinion was offered only upon his comprehensive review of a limited number of charts. In defending respondent's reluctance to be drawn in "as primary case manager" we believe that Dr. Wilson must have assumed that she was consulting with professionals who could serve as primary care physicians. We think the record herein demonstrates that the assumption was erroneous and accordingly we modify the ALJ's underlying premises as described herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COUNT I

By Count I, the State has alleged that respondent improperly failed to maintain records of fees charged and paid, in violation of *N.J.A.C.* 13:35-6.5 and *N.J.S.A.* 45:1-21(e). Finding that *N.J.A.C.* 13:35-6.5, at present, does not make reference to such a requirement, the ALJ determined to dismiss the count. While the Board has determined that it will not disturb this result, it notes that a pending proposed rule revision appearing at 21 *N.J.R.* 3253 does expressly incorporate a requirement to maintain billing records, a revision which it believes codifies the present standard of practice.

COUNT II

Complainant, at Count II, alleged that respondent violated several statutes, in relation to her operation of DNB Laboratories and in her preparation of the reports that emanated from that entity. Specifically, it was alleged that:

1. respondent failed to disclose her ownership interest in the laboratory in violation of *N.J.A.C.* 13:35-6.4 and *N.J.S.A.* 45:1-21(e) and (h);

2. respondent failed to report to patients the true cost of laboratory services in violation of *N.J.S.A.* 45:1-10;

3. respondent's issuance of DNB laboratory reports with revised reference ranges constituted a misrepresentation of the significance of the results obtained and thus was violation of *N.J.S.A.* 45:1-21(b) and/or (e) and (h) and *N.J.A.C.* 13:35-6.4; and

4. respondent's operation of a unlicensed laboratory as a General Business Corporation contravened *N.J.S.A.* 14A:17-1 *et seq.*

FINDINGS OF FACT

Respondent adopts the Findings of Fact appearing at p. 29-31 of the ALJ decision, deleting and adding[9] language in findings 16 as follows:

> 16. In some instances charges assessed by the DNB were higher than those charged by other laboratories for the same or similar work. [However, in such instances differences took into account the fact that DNB legitimately had to recover various costs and expenses in connection] *DNB had incurred some expenses associated* with the hiring training and supervising of personnel, administration of the operation, maintenance of computerized recordkeeping and similar such costs associated with the enterprise of that sort. In no instances was DNB's charge so exorbitant as to raise serious question with regard to the propriety of the charge.

CONCLUSION OF LAW

ALJ Weiss concluded that respondent failed to disclose to her patients ~~that she~~ had an ownership interest in DNB Laboratories, a conclusion which she has disputed, contending that all her patients were aware of her interest. Not only does it appear that the patients were not fully apprised of their option to have testing conducted at the facility in which respondent did not have an interest, the structure of the entity and its interrelationship with the respondent's practice tended to obfuscate what was really going on. DNB was portrayed to patients as a laboratory, at which they could have logically assumed that their test would be conducted, when in fact this was not the case. Instead DNB was the entity which (1) subcontracted with facilities and practitioners to collect specimens, (2) arranged for the transmission of those specimens to recognized licensed laboratories (where the assays

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[9] ~~Additions~~ to findings, throughout this decision, will be underlined *thus*; deletions indicated [thus].

were performed), and (3) received lab reports, transposing and extrapolating those results onto its own letterhead. Patients receiving DNB laboratory reports were, in the Board's view, misled as to the services performed in violation of *N.J.S.A.* 45:1-21(b). Since DNB had those assays performed by licensed laboratories and made payments to those entities, respondent should have disclosed to patients the names and address of the laboratories used and the amounts paid. The Board finds respondent's failure to have provided such information to be a violation of *N.J.S.A.* 45:1-10.

The Board will not disturb the ALJ's conclusion with respect to the complaint's allegation that the structure of DNB violated *N.J.S.A.* 14A:17-1 *et seq.* That statute requires that those offering "professional services" to the public in ancorporate format should do so in the context of a professional service corporation. We are unprepared, on the basis of this record, to conclude that DNB was improperly organized to service the proven population or that its form of organization should be found to be the basis of sanctions against respondent.

COUNT III

The Administrative Law Judge aptly noted the multifaceted nature of this count. Like Judge Weiss we note that most of the allegations contained herein are reiterated in the substantive counts to follow. Like Judge Weiss we have chosen to deal with these charges in the specific patient cases. What Count III does raise, which is not repeated elsewhere, is the charge that respondent engaged in misrepresentation with regard to her research. In the context of this case we accept Administrative Law Judge Weiss' conclusion that this charge will not form the basis for sanctions. Though the public has legitimate expectations that "research" is being conducted in accordance with accepted community standards, it is not the focus of the instant matter and we will not disturb the ALJ's disposition here.

COUNT IV

FINDINGS OF FACT

The Board supplements one paragraph of the narrative as follows:[10]

Second paragraph:

The patient testified she first heard of Dr. Brayshaw from acquaintances at her church, and since she had a longstanding thyroid problem, she consulted with respondent about it. According to E.A., she suffered from an overactive thyroid and had been taking .125 mg/day of Synthroid for about two years at the time she first saw Dr. Brayshaw in July 1986. On that first visit, E.A. was interviewed by respondent for about one and one-half hours. No physical examination was conducted, nor were E.A.'s vital signs taken by anyone at that time. Although Dr. Brayshaw told E.A. that she was "severely undermedicated," no medications were prescribed at that time and an appointment was made for the patient to have laboratory tests done. *On the out patient record sheet, completed by E.A. on July 7, 1986, she indicated that her last physical had been performed on July 1985 by Mary Herald, M.D. She herself reported her current medical problems to be: hypothyroidism and constipation. Respondent made insufficient effort to ascertain from Dr. Herald what her findings on examination might have been, or to collaborate with Dr. Herald concerning their mutual patient's treatment.*

DISCUSSION

We concur with ALJ Weiss' decision in this count. We do note however that we are not holding that respondent had an obligation to *personally* conduct her own physical examination, as ALJ has suggested that she ought to have done here. If the psychiatrist is

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[10] ALJ Weiss chose to set forth his findings as to this count in a narrative fashion, a format which we will follow as well. Contrary to respondent's assertion, he clearly made findings as to E.A.

truly acting as a consultant (a premise which we have not accepted with respect to respondent), he or she should collaborate with other treating physicians to assure that psychopharmacologic treatment decisions are predicated on a full understanding of the patient's current physical condition. As we have indicated above that knowledge can be obtained from another physician who is concurrently following the patients and sharing his or her findings with the psychiatric consultant. This is not the model that respondent followed in this case, nor is it the model that she followed in most of the other cases herein.

Like Judge Weiss, we are equally disapproving of her failure to speak directly with patients who rightfully and logically assumed she was their treating physician, as E.A. did. That respondent may speculate that a patient's symptoms relate to something other than Synthroid does not give her license to refuse to listen to the patient nor does her election to use the title of consultant absolve her of the responsibility to deal compassionately with those that have come to her for help.

Respondent's failure to have ascertained information concerning E.A.'s physical status prior to treatment, in concert with her failure to personally respond to E.A.'s reports of adverse symptoms, in our view evidence gross malpractice in violation of *N.J.S.A.* 45:1-12(c).

COUNT V

FINDINGS OF FACT

The Board modified the findings of fact as follows:

1. Patient P.C. made her first visit to respondent on October 17, 1985, complaining of premenstrual syndrome[.] *and "thyroid." She reported on the outpatient record sheet that she was referred by Tony Palisi, a psychologist, but indicated that her last physical was performed by Dr. H. Bastemuir in April 1985.*

2. *Significantly, respondent's chart for P.C. does include copies of records from other treating doctors which P.C. had arranged to have sent. Additional correspondence in the chart*

reveals that on two separate occasions, by letter of November 26, 1986 and August 4, 1987, P.C. asked respondent to send a report to her family doctor.

DISCUSSION

Here, even the patient realized the need for collaboration with her family physician. Respondent clearly should have maintained contact with the patient's doctor so as to become fully aware of P.C.'s physical status and to apprise him of her findings as well. We think respondent's failure to collaborate with the patient's physician, especially in the face of P.C.'s specific request that she do so, constitutes negligence in violation of *N.J.S.A.* 45:1-21(d).

We also take exception to ALJ Weiss' discussion concerning the etiology of the palpitation from which P.C. suffered. Whether this symptomatology was or was not related to the Synthroid, does not alter the duty respondent owed to her patient to learn of her physical status, participate in the coordination of her care, and respond to complaints in a timely manner.

COUNT VI

DISCUSSION

Because respondent never actually embarked on a course of treatment of S.C.C. after the initial visit, the Board will not disturb the dismissal of this count.

COUNT VII

DISCUSSION

Like many of the other patients in this complaint, respondent undertook treatment without making any effort to obtain a contemporaneous assessment of the patient R.C.'s physical status. Here the patient reported prior endocrine treatment, and respondent apparently made no effort to conduct a physical or learn of the results of a physical conducted by any other doctor. Indeed, Dr. Agrin, the subsequent treating physician who testified,

noted difficulty in reaching respondent in a effort to coordinate the care rendered to this patient. Without such information, her decision to treat was negligent and in violation of *N.J.S.A.* 45:1-21(d).

COUNT VIII

FINDINGS OF FACT

The Board expressly adds the following to the findings of fact:

1. Patient, D.D., consulted with Dr. Brayshaw for the first time on June 12, 1986, complaining of premenstrual syndrome, anxiety and panic. She also described symptoms of insufficient thyroid hormone, including dry skin, cold intolerance, fatigue and need for excess sleep. *Respondent described her as a "brittle asthmatic with a complicated medical regimen." She was referred by a friend and indicated on the outpatient record sheet in the spaces seeking the dates of last physical examination and last E.K.G. "?"*

2. Laboratory tests ordered by Dr. Brayshaw suggested a thyroid protein binding deficiency. Based upon the test abnormalities and clinical symptoms described by the patient, Dr. Brayshaw determined that Synthroid therapy would be appropriate for *treatment of an endocrine condition*, even absent any psychiatric conditions. Thus, Dr. Brayshaw prescribed Synthroid to a maximum of .125 mg/day.

DISCUSSION

With D.D., respondent sought to treat a "thyroid binding protein deficiency" with a "diagnostic trial of Synthroid." Without even having to reach the issue of whether that therapeutic approach was appropriate, it is evident that respondent was not merely acting as a psychiatric consultant but was acting as an endocrinologist. A physical examination should have been permitted by respondent or another physician with whom respondent could collaborate. There is no evidence that respondent took any measure to assess the patient's current physical status.

Her failure to do so was negligent and a violation of *N.J.S.A.* 45:1-21(d).

COUNT IX

FINDINGS OF FACT

The Board modifies the findings as follows:

1. Patient L.D. first saw Dr. Brayshaw on January 23, 1986, presenting complaints of premenstrual syndrome, lethargy and depression. *On the outpatient record sheet, L.D., a nurse, listed the reasons she had come for an "evaluation" as "wt. gain, depression and difficulty in losing weight." She noted that her doctor was Oliver Brown, but that she was self-referred. Her last physical and E.K.G. were reported to been conducted in 1982 at the "Thin Life Center."*

DISCUSSION

While L.D. may not have had any particular condition which would have specifically indicated the need for a physical, she reported her last physical had been conducted more than three years prior to her visit. Surely respondent ought to have had a more contemporaneous assessment of the patient's physical status. Her decision to go forward with treatment in the absence of such knowledge was in our view negligent and thus sanctionable pursuant to *N.J.S.A.* 45:1-21(d).

ALJ Weiss finds that respondent failed to record in the patient record why she prescribed Synthroid, yet he declines to find a violation since he states: "specific criteria for determining what a psychiatrist such as Dr. Brayshaw must include in a patient record have never been set forth in any manner which would make what she did in this case a violation." Although we believe it has always been the standard, in all branches of medicine that records should reflect why treatment was undertaken, we have determined not to disturb this result.

COUNT X

FINDINGS OF FACT

The Board makes the following addition to the findings of fact:

1. Patient C.D. was first seen by Dr. Brayshaw on October 19, 1986, and presented with complaints of anxiety, panic and depression. At that time, she was on an extensive regimen of medications and also admitted to significant use of alcohol. *She reported on the outpatient record sheet that in July 1986, she had had a physical conducted by a "Dr. Kelsey." She reported her current medical problems included: "Ulcer just healed, Hiatal hernia, pain and heartburn." She was referred by Lynn Holmes, a psychologist. There is no indication in respondent's record that she attempted to consult with Dr. Kelsey to learn more about the patient's physical status before embarking on treatment, or to collaborate with him or any other physician during the period that the patient was experiencing adverse symptoms.*

DISCUSSION

We concur with ALJ Weiss' conclusion that respondent ought to have seen to it that a physical was performed and that she was in a position to know the findings made on physical examination. We can not agree, as respondent would like us to, that she was "not operating in the dark" with regard to the patient's cardiac status, since the patient had reported a relatively recent physical and E.K.G., inasmuch as respondent did not know the results or findings.

Nor does this Board accept respondent's contention that her letter response to the patient and her messages through an intermediary are adequate. We agree with Judge Weiss:

> C.D. was a frightened person, and a physician, even a biopsychiatrist cannot cavalierly dismiss such a patient's concerns by informing her, either through an intermediary or in writing, simply to "forge on."

To do so is negligent, and in concert with the failure to have ascertained adequate information concerning the patient's physical status, it is grossly negligent, pursuant to *N.J.S.A.* 45:1-21(c).

COUNT XI

FINDINGS OF FACT

The Board expressly modifies Finding #3, deleting and adding language as indicated:

3. Dr. Brayshaw conducted no physical examination of L.F. [nor is there any indication that she ascertained whether such an examination had been conducted by a physician within recent months.] *The outpatient record sheet relating to L.F. indicates that her last physical occurred one year prior, in October 1985. There is no mention of Dr. Nagar, the examining physician, in respondent's record, nor is there a referring physician mentioned on the outpatient record sheet.*

DISCUSSION

While the Board will not disturb ALJ Weiss' conclusion that respondent should not be sanctioned for her failure to recognize and properly manage L.F. in a way so as to "interdict" the suicide attempt, we cannot conclude the respondent's handling of the patient was in accordance with the accepted standard of care. L.F. came to respondent with a complex psychiatric history and, indeed, several hospitalizations, reporting anxiety and depression. Before embarking on a course of treatment with the side-effects known to accompany Synthroid, respondent owed L.F. the duty of ascertaining more information about her current physical and mental status. That respondent's expert was candid in leveling criticisms on respondent should hardly be the justification for resolving doubts in respondent's favor. In L.F., respondent had taken on a complex case, which clearly should have required her to collaborate closely with treating physicians and other health care providers. To fail to do so, in our view was negligent, and thus sanctionable pursuant to *N.J.S.A.* 45:1-21(d).

COUNT XII

FINDINGS OF FACT

The Board modifies Finding #12, as follows:

12. During the course of his treatment of R.F. after she had consulted with Dr. Brayshaw, Dr. Sorvino made contact with a psychiatrist on the faculty of the University of Pennsylvania who uses Synthroid in treating psychiatric patients *who exhibit rapid cycling depression.* This physician wrote to advise Dr. Sorvino that in a patient of this sort .3 mg/day of Synthroid [is] could be appropriate, *so long as she does not manifest symptoms of thyrotoxicosis (e.g., tachycardia, palpitations, severe tremor). He offered to serve as a "consultative backup," concurrently following the patient and collaborating with Dr. Sorvino.*

DISCUSSION

Again, in patient R.F., respondent had taken on an extremely complex patient, with a history of some nine hospitalizations since 1961. While in some measure, respondent seemed aware of the need to collaborate with another physician in the case of this patient, as evidenced by her letters to Dr. Sorvino in early 1985, arranging coverage for this patient when she was going out-of-town, she still should have had a better assessment of current physical status. We concur with Judge Weiss that the "failure by Dr. Brayshaw to at least have made a reference for a physical examination was inappropriate." We are not persuaded that respondent should be relieved of this responsibility because she "picked her up" as an outpatient from Fair Oaks and only followed her for six months. Nor do we find this conclusion should be alerted by the fact that Dr. Sorvino did not perform a physical. Respondent should have known more about this patient's physical and mental status before treatment, and her failure to do so violated of *N.J.S.A.* 45:1-21(d).

COUNT XIII

FINDINGS OF FACT

The Board makes the following modifications in its findings of fact:

1. Patient K. (also known as C.) G. first saw the respondent on September 24, 1986, and complained of anxiety, depression, mood swings and phobias. K.G. has a long history of depression, migraines and PMS. *She was referred by Angelo Spinazzola, a psychologist.*

2. K.G. also had a history of hypertension, and at the time she first visited respondent, she was taking a combination of medications including Tenormin, Catapres, Capoten, Procardia, Spironolactone and Valium. *K.G. reported on the outpatient record sheet that Dr. Modlinger had performed a physical in July 1986. There is no indication in respondent's record that she made any effort to speak with Dr. Modlinger concerning K.G.'s current status, the medications he had prescribed or her own plans for treatment.* Dr. Brayshaw believed that [this] *the above* combination *of medications* was inadvisable.

DISCUSSION

We agree with ALJ that given this patient's constellation of symptoms and her current course of treatments, respondent should have had knowledge of the findings made on physical examination before embarking on a treatment regimen. Notes from the doctor at the testing center, indeed, indicate that he was "going to talk to her regular doctor about her." The need to collaborate with other physicians was thus so manifest in this case, that respondent's failure to do so in advance of treatment was negligent and sanctionable pursuant to *N.J.S.A.* 45:1-21(d).

COUNT XIV

FINDINGS OF FACT

The Board modifies the findings of fact of ALJ Weiss, as follows:

1. Patient J.G. was first seen by respondent on May 2, 1986, complaining of depression and PMS. *J.G., a registered nurse, noted on the outpatient record sheet that she had come to respondent to "identify a chemical or hormonal imbalance." She listed no referring physician, and, indeed, was referred by a friend. She noted that her last physical was performed by Dr. Lim of Rahway in December 1985. No date was provided for the last E.K.G. Her "current medical problems" were listed as: "Galactorrhea" and "irregular period." There is no mention in respondent's office notes concerning Dr. Lim. There was a reported family history of heart disease.* Laboratory tests ordered by respondent indicated that the patient had a thyroid binding globulin deficiency.

DISCUSSION

As with most of the other patients named in this case, we find respondent's failure to have taken efforts to ascertain J.G.'s current physical status prior to treatment to have been negligent. Similarly, the Board finds fault with respondent's failure to have had a physical undertaken as J.G. reported adverse symptoms.

But again, what the Board finds equally disturbing here is respondent's refusal to deal personally with the patient experiencing these symptoms. We can not accept respondent's arm's length response as simply a matter of personal style. A patient, who is herself a registered nurse, with a familiar history of heart disease, who is experiencing palpitations, chest pains, fatigue and an inability to concentrate is owed a personal response. Respondent's rationalization that these symptoms might not have been related to the Synthroid because J.G. was being maintained at a low dose misses the mark. A concerned patient deserves to have her concerns addressed by her doctor. Respondent's failure

here, in combination with her failure to adequately assess the physical status of the patient, constitutes gross malpractice in violation of *N.J.S.A.* 45:1-21(c).

COUNT XV

FINDINGS OF FACT

The Board makes additions to the findings of fact as noted:

1. Patient F.H., a 47-year old male, first saw respondent on January 16, 1986, complaining of anxiety and symptoms including dry skin, cold intolerance, weight gain and constipation. *He indicated he had come for an evaluation for hay fever and aches and pains.* Respondent ordered laboratory tests for him and the results suggested to respondent that the patient had hypothyroidism. F.H. also admitted to an alcohol problem and the tests indicated to her that he had a related liver problem as well.

2. F.H. also had a history of rheumatic fever and to respondent's knowledge had undergone heart valve replacement. *Indeed, F.H. noted on the outpatient record sheet that Dr. Sachs had last performed a physical in October of 1985.*

4. Despite F.H.'s history of heart problems, respondent felt she appropriately could prescribe Synthroid since she believed he was frequently monitored by his cardiologist and her dosage would be at a safe level. *She did not discuss with the cardiologist the patient's present status or the impact that her regimen might have on his condition prior to initiating Synthroid therapy*

15. There is no evidence that respondent refused to speak with F.H. regarding complaints of adverse symptoms.

DISCUSSION

The Board is in agreement with ALJ Weiss concerning respondent's failure to coordinate her treatment with that provided by his cardiologist. Her decision to treat with Synthroid without a full understanding of this patient's cardiac history and a

contemporaneous assessment of his status was in our view negligent.

In keeping with the analysis which the Board has applied in other counts of this complaint, it does not find respondent's care to evidence gross malpractice, since there was no evidence that respondent failed to respond to any request for assistance as has been shown in the other counts where such a finding has been made. Accordingly we find respondent's care of F.H. evidences negligence in violation of *N.J.S.A.* 45:1-21(d), not gross negligence.

COUNT XVI

FINDINGS OF FACT

The following modifications are made by the Board:

1. Patient S.H. consulted respondent for premenstrual syndrome and fatigue. She also suffered from allergies and was taking various medications for them, including Decadron, a steroid. *She noted no referring physician, and did not indicate when her last physical or E.K.G. had been performed.*

DISCUSSION

Again, this patient, in our view, should not have been treated without a full understanding and knowledge of her physical status. If respondent elected not to perform that physical herself, she was obligated to make sure it was done elsewhere. Such a conclusion is not dependent upon an assessment of the relative credibility of respondent and Dr. Stock; it is simply reflective of what this Board has concluded the appropriate standard of care requires under the circumstances here present. The patient's simultaneous ingestion of alcohol and allergy medications does not explain away the adverse symptoms; it makes concurrent medical followup all the more important. Respondent's care of S.H. was thus negligent and sanctionable pursuant to *N.J.S.A.* 45:1-21(__).

COUNT XVII

FINDINGS OF FACT

The Board modifies the findings of fact as follows:

1. Patient A.H. first consulted respondent in June 1986 complaining of anxiety, panic attacks and phobias. She had been referred to respondent by her psychologist and reported prior psychiatric hospitalizations. *The outpatient record sheet reflects that her "current medical problems" included "diabetes controlled by diet, hiatel [sic] hernia, phlebitis, hear words distorted, recovering from bladder repair surgery (May 12th and May 16th) two operations." She further indicates that her last physical was within the year.*

DISCUSSION

As the J.G. and C.D. we have identified two departures from the appropriate standard of care as to A.H. First, as with most of the other patients, the absence of a contemporaneous physical, or at least coordination with a physician who had performed such a physical was a deviation. Respondent's handling of A.H. once she was experiencing distress constitutes a deviation of the standard of care as well. In concert, these breaches evidence gross malpractice in violation of *N.J.S.A.* 45:1-21(c). Respondent's efforts to explain that A.H.'s symptoms could have related to medications prescribed by others, again, misses the point. The adverse symptoms which A.H. was trying to report to respondent are those which have been associated with Synthroid; respondent should have made herself available and taken the appropriate measures to relieve this patient's symptoms, or at least her concerns.

COUNT XVIII

FINDING OF FACT

The findings of fact are supplemented as follows:

1. Patient E.J., *a 20 year old*, first consulted Dr. Brayshaw on February 19, 1986 complaining of mood swings, depression and a possible eating disorder. Dr. Brayshaw conducted no physical examination on the patient nor did she weigh her. *Her last physical was reported to have been done in the summer of 1984 by Dr. Buff. She listed no referring physician, although respondent's record reflects that she was referred by "O'Hare" of the counselling service at E.J.'s college.*

2. Dr. Brayshaw ordered laboratory tests and determined the patient had thyroiditis and possible hyperthyroidism. *She conveyed this diagnosis to E.J.'s counsellor at college.*

DISCUSSION

Here again, respondent identified an endocrine condition, thyroiditis, and was acting as an endocrinologist without benefit of an initial physical examination or any knowledge of physical findings made by a physician who might have been concurrently following the patient. Separate and apart from whether the treatment regimen selected was appropriate, a selection with which both Drs. Rosenbaum and Green disagree, respondent's failure to know and follow the patient's physical status was negligent and thus in our view sanctionable pursuant to *N.J.S.A.* 45:1-21(d).

COUNT XIX

FINDINGS OF FACT

The findings of facts are supplemented in the following manner:

1. Patient E.K. first visited respondent in June 1986 complaining of chronic depression and obesity. *She had been referred by Dr. Robert Groggins, a psychologist. She reported that*

she had not had a physical in "over 5 years," but noted her current medical problem as "hypoglycemia." Respondent noted in her record that the patient had recently made a suicide gesture.

7. On January 6, 1987, E.K. again visited Dr. Brayshaw. At that time she was on .15 mg/day of Synthroid. According to respondent, E.K. reported that she felt improved — her depression had disappeared and she had greater energy. *Yet respondent's own notes for this visit reflect the following notations, "last mo. (+) PMS, (+) anxiety attack" . . . "cried a lot," "withdrawn," "mind races," "insomnia."* Dr. Brayshaw determined that given the continuing weight problem E.K. had, she should increase her dose to .25 mg/day [absent ill effects].

DISCUSSION

We concur with ALJ Weiss' observations in his discussion of this count, and further note that the entries in respondent's own January 6, 1987 chart would seem to belie respondent's contention that the patient "improved on the Synthroid regimen." E.J. was exhibiting symptoms that respondent clearly ought to have addressed. We agree that respondent's failures with regard to her management of this patient are negligent and therefore sanctionable pursuant to *N.J.S.A.* 45:1-21(d).

COUNT XX

FINDING OF FACT

The Board modifies the findings of fact as follows:

1. Patient M.K. consulted with respondent on April 15, 1986, complaining of panic and anxiety. She reported that she previously had been treated with a variety of drugs, including Valium, Elavil and Limbitrol, for both her anxiety and for depression, *and that her last physical was performed by "Dr. Berkowitz" in April of 1985. Her "referring physician" was Stephen Hamelburg, a psychologist. Respondent noted in her follow-up letter to Dr. Hamelburg that M.K. "was in an acute state of dehydration and*

starvation". The patient was described as a "very complicated lady."

4. On [her second visit] April 19, 1986 respondent prescribed Inderal for M.K. in order to help the patient deal with complaints of palpitations and anxiety, and to amerliorate withdrawal symptoms from the Limbitrol.

7. *On May 7, 1986, respondent did have M.K. execute a form to secure medical records from a prior treating physician, Dr. Sternbach, indicating her desire to obtain laboratory data (not the results of a physical examination).*

DISCUSSION

While there is no evidence that respondent initiated M.K. on Synthroid, she did make a therapeutic decision when she issued a prescription for Inderal. Before doing so, good medical practice dictated that she obtain additional information about the patient's physical status either by conducting her own physical or by collaborating with another treating physician. Although respondent's omission here is not of the same magnitude as that noted in other counts, nonetheless, we find it negligent and thus sanctionable pursuant to *N.J.S.A.* 45:1-21(d).

COUNT XXI

FINDINGS OF FACT

The findings of ALJ Weiss are modified as follows:

1. Patient C.M. first consulted respondent on November 20, 1986 complaining of anxiety, postpartum depression and PMS. The patient also complained of palpitations and was obese. She listed hypoglycemia as a current medical problem. *She gave no date for when her last physical had been performed, nor did she list a referring physician. Respondent's records make mention of Dr. Charles Dooley (GP) without elaboration.*

DISCUSSION

While respondent's deviation here may not be as marked as in other counts, she had a patient who reported no recent physical and whose chief complaint was a weight problem. She was assuming the role of a primary treating physician without benefit of any contemporaneous assessment of the patient's physical condition. As we have held, throughout, such conduct is negligent and sanctionable pursuant to *N.J.S.A.* 45:1-21(d).

COUNT XXII

FINDINGS OF FACT

The Board supplements the findings of fact as follows:

1. P.M. first consulted with respondent on February 18, 1986, complaining of moodiness, depression and exhaustion. *She sought to "rule out physical problem."* She also reported using a minor tranquilizer and that she drank heavily. *She further noted on the outpatient record sheet that her most recent physical had been performed by William Pond in April of 1985.*

DISCUSSION

Like the other patients in this complaint, we conclude that respondent should have made efforts to ascertain information concerning the patient's physical status before and during her treatment. This failure violated *N.J.S.A.* 45:1-21(d).

COUNT XXIII

FINDINGS OF FACT

The findings with regard to S.P. are supplemented in the following manner:

1. Patient S.P. first consulted with Dr. Brayshaw on April 2, 1985, complaining of depression, premenstrual syndrome and migraine headaches. In relating her history, she also noted

multiple miscarriages and fibroadenomatous breasts, which suggested hormonal problems. *She reported on the outpatient record sheet that she had never had an E.K.G. She wrote "?" in the space provided for the last complete physical examination, but listed Dr. Robert Shepardson as her doctor.*

4. At that point, respondent began to prescribe Synthroid (beginning with .025 mg/day and proceeding up to [*illeg.*] mg/day). She also prescribed Norpramine, an antidepressant.

DISCUSSION

ALJ Weiss has determined that because he found no competent evidence to support the allegation that respondent improperly prescribed .4 mg of Synthroid to S.P. each day, the count should be dismissed. We disagree, finding the ultimate dose to be immaterial to our conclusion that respondent should not have embarked on treatment without a better knowledge of this patient's medical status. The symptoms reported to respondent should have signalled to respondent the need for medical follow-up. Her failures with regard to this patient in our view demonstrate negligence in violation of *N.J.S.A.* 45:1-21(d).

COUNT XXIV

FINDINGS OF FACT

The findings herein are modified as follows:

1. Patient, W.R., a male, first saw respondent on March 13, 1985, complaining of chronic depression, manic episodes and a history of bipolar disorder. He was then taking an antidepressant, Desyrel. In light of patient's history of past seizures, respondent directed W.R. to discontinue taking the Desyrel. *He was referred by Virginia Waters, a therapist with whom respondent appears to have consulted periodically.*

11. The last physical was reported in January of 1985, two months before W.R.'s first visit with respondent. It also appears that in this case respondent was acting as a more traditional psychiatrist, consulting with the patient's therapist periodically.

12. No testimony from W.R. was offered and it appears that Dr. Sorvino served only briefly as treating physician, and could offer no "competent" insight as to the patient's responses to Synthroid.

DISCUSSION

While troubled by respondent's apparent initiation of treatment without benefit of a contemporaneous physical examination, on the basis of the record before us in this matter, we are affirming ALJ Weiss' dismissal of the count.

COUNT XXV

FINDINGS OF FACT

The Board modifies the findings of fact as follows:

1. G.S. first saw respondent on May 30, 1986, complaining of anxiety, mood swings and chest pains. The patient also reported he had undergone a complete physical examination, including an E.K.G. and stress test, in March 1986, *conducted by Harry Silver. He was referred to respondent by Nick Molinaro, a psychologist.*

12. Respondent did send out for laboratory data relating to the liver biopsy and the E.K.G. in May of 1986, but there is no record of any professional interaction with a concurrent treating physician who had performed a contemporaneous physical examination.

DISCUSSION

The Board finds respondent's failure to have made herself more aware of this patient's physical condition given the constellation of symptoms that he reported to constitute negligence. There is no evidence in her record to suggest that she sought to have this patient concurrently followed by a physician familiar with his medical problem, if she herself was unwilling to take on that task. We find this management to be negligent and thus sanctionable pursuant to *N.J.S.A.* 45:1-21(d).

COUNT XXVI

The Board adopts in its entirety all of the findings of fact made by ALJ with respect to MT.[11] We also concur with the conclusions expressed in the discussions, and stress our agreement with his statement:

> However, by failing to see what was happening with M.T., even though she was receiving reports often enough from the parents of bizarre and psychotic behavior, respondent wrapped herself in the protective cloak of "consultant" and made little or no effort, until too late, to recognize the fact that her role was much greater than that. After all, this was a patient who had been referred by a psychologist, not a primary care physician. Hiding behind the "consultant" label in a situation of this sort is not tolerable.

Respondent's management here was grossly negligent in violation of *N.J.S.A.* 45:1-21(c).

COUNT XXVII
FINDINGS OF FACT

Finding #1 is supplemented as follows:

1. Patient B.T., a male, first saw respondent on May 2, 1985 with complaints of depression and anxiety. Dr. Brayshaw concluded that he had a history of alcohol and substance abuse and a number of symptoms associated with hypothyroidism, including weight gain, dry skin, fatigue, and sluggishness. *No entry was made in the space provided on the outpatient record sheet for the last complete examination.*

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[11] We note that ALJ found that respondent's conduct violated N.J.A.C. 13:35-6.5. Since this is the only count where ALJ Weiss made such a finding and he offers no explanation, we will dismiss that charge, believing that its inclusion here was inadvertent.

DISCUSSION

As in so many other counts the Board is disturbed by respondent's failure to have a contemporaneous assessment of the patient's medical condition prior to treatment. Again, we find such to be negligent treatment in violation of *N.J.S.A.* 45:1-21(d).

COUNT XXVIII

Though the Board has misgivings about respondent's failure to have a contemporaneous physical done, on the basis of the record before us, which is devoid of any testimony, we will affirm the ALJ's dismissal.

COUNT XXIX

Again, the Board does not condone respondent's initiation of treatment without a physical, but it will, on the basis of the record before it, in the absence of live testimony, affirm the dismissal of this count.

COUNTS XXX, XXXI, XXXII, XXXIII, XXXIV

FINDINGS OF FACT

We are electing to consolidate the next five counts, separating out the findings as to the patients involved, with modifications as indicated:

B.M.

4. The substance of the letter and its attachments was that B.M. had not properly been diagnosed or treated, that she had difficulty in reaching Dr. Brayshaw by telephone *even after indicating it was an emergency situation*, as did her husband and [another physician,] *her psychologist*, and that she had been charged an exorbitant amount of fees.

M.E.L.

2. In her letter, M.E.L. described the history of her relationship with the respondent and also discussed her difficulties in reaching the respondent by telephone, *although it is unclear from her letter whether she expressly asked to speak with respondent. She also mentioned that an unnamed physician had difficulty trying to contact Dr. Brayshaw.* She also claimed that she was unsuccessful in attempting to obtain copies of laboratory reports. Following her receipt of advice from an endocrinologist to stop taking Synthroid, she became frightened and did so.

C.A.J.

No modifications.

G.M.H.

No modifications.

J.D.

No modifications.

S.W.L.

No modifications.

B.R.

No modifications.

F.W.

No modifications.

W.B.

No modifications.

We, too, will reserve discussion of P.A.Q., a patient whose record was ultimately produced by respondent.

DISCUSSION

Like Judge Weiss, we are finding respondent engaged in gross malpractice with respect to the patients (save M.L. for reasons set

forth below) for whom she failed to produce records, based on our review of what was produced by the Attorney General. Indeed, we are moved by the first-hand accounts of the patients who did testify with respect to the distress they were in, the difficulties they encountered in their attempts to speak personally with respondent, and the callous response with which their pleas for help were met. We conclude that respondent failed to adequately address the physical status of these patients or collaborate with other treating physicians before and during treatment. That omission, coupled with her refusal to deal personally with those seeking her assistance in our view evidences gross malpractice.

While we suspect these failures were also displayed in her management of M.L. in the absence of live testimony from either the patient or a subsequent treating physician, we are uncertain as to the nature of the interactions which M.L. had with respondent's office personnel. The phrasing in her "certification" does not make it clear that she requested to speak with respondent. For these reasons we will reverse the ALJ decision as to M.L.

P.A.Q.

FINDINGS OF FACT ON P.A.Q.

No modifications except the following supplementation are made:

1. P.A.Q. first consulted with Dr. Brayshaw in November 1986 after receiving a questionnaire in the mail, upon a referral by James Savage, a psychologist. During that first visit, they discussed the responses. No physical examination was conducted. *P.A.Q. indicated that she had never had an E.K.G.; her last physical was reported to have been conducted in February 1986.*

DISCUSSION ON P.A.Q.

While we agree with ALJ Weiss' observations, we differ with his conclusions here. The pattern of conduct, both in respondent's failure to adequately assess the patient's physical status and her

failure to respond to a patient in obvious distress evidence gross malpractice; sanctionable pursuant to *N.J.S.A.* 45:1-21(c).

Having found that respondent was grossly negligent in her care of nine out of the ten patients named in Count XXX, we find it unnecessary to separately address the more limited charges set forth in Count XXXI (wherein it was alleged that Synthroid therapy was not medically indicated as to patients W.B., C.A.J., S.W.L., B.M., B.R., M.L. and P.A.Q.), Count XXXII (Synthroid was prescribed in dosages not indicated to J.D., G.M.H., F.W.), Count XXXIII (patients J.D. and G.M.H. advised to discontinue medications prescribed by other physicians) and Count XXXIV (Synthroid prescribed without recognition of risks).

COUNT XXXV

We agree with ALJ Weiss that these are the same allegations with which we dealt at Count II, and accordingly, we affirm the dismissal here.

COUNT XXXVI

We note that this count was dismissed on motion dated November 30, 1987.

COUNT XXXVII

We will affirm ALJ Weiss' dismissal of this count, noting as well that one of the patients identified was herself a mental health care professional so that respondent might have felt she was engaging in a professional dialogue.

COUNT XXXVIII

Respondent virtually acknowledged that the prescriptions she issued did not always bear all of the identifying information as required by *N.J.A.C.* 13:35-6.6. Without minimizing the importance of the requirements of that regulation, the Board has

determined that its finding of a violation here will not form an independent basis for sanctions.

COUNT XXXIX

By Count XXXIX, the Attorney General charged respondent with having sent a letter to prospective witnesses in an effort to dissuade them from testifying in this proceeding by advising that they would face embarrassment and inconvenience. Respondent maintains that the letter was crafted by her prior counsel and sent under her signature at his advice. Complainant would nonetheless hold the doctor responsible. While this Board does not doubt that it should be able to hold its licensees responsible for correspondence which they direct to their patients, we have already noted our disapproval of that letter in our interlocutory order of December 22, 1987. In that order, wherein we reversed the ALJ's ruling with respect to the Attorney General's motion to close the portions of the hearing at which patients were to testify, we stated (by way of a footnote on page 3):

> We note, with distress, the respondent has communicated, by letter, with at least a few of the patients described in the complaint, in what appears to be an effort to dissuade them from testifying. Indeed, in her November 27, 1987 letter, she warns that the patient may fare [sic] "embarrassment" as a result of being "forced to testify in open court." While professing that she does not want the patient's private life to become an open record, it is respondent who has opposed the implementation of mechanisms to protect the confidentiality of patient records.

Having already registered our disapproval, we see no reason to disturb ALJ Weiss' disposition dismissing the count.

COUNT XL

The Attorney General had charged that respondent's issuance of correspondence to certain patients in October 1987 constituted misrepresentation and professional misconduct. Specifically,

respondent excised portions of an affidavit which had been executed by Dr. Ehrenkranz relating to patient S.P. Judge Weiss found that the deliberate deletion of her third paragraph "changed the thrust of that document and resulted in a version which I believe failed to convey the facts as Dr. Ehrenkranz found them to exist. We are not persuaded that respondent was trying to "excise a falsehood," nor that she had put the affidavit in context by describing Dr. Ehrenkranz in her covering letter as one of her critics. The manner in which the affidavit was presented to the patient was in our view deceptive and thus sanctionable pursuant to *N.J.S.A.* 45:1-21(b) and (e). We agree with Judge Weiss; respondent here stepped over the line.

LEGAL AND PROCEDURAL CHALLENGES

Respondent, throughout the course of this proceeding and by way of her exceptions and cross-exceptions, has raised numerous challenges which are legal and procedural in nature. Many of those challenges relate to the following issues: (1) scope of the proceedings; (2) discovery; (3) evidentiary rulings; (4) the sanctions order; and (5) representation by Steven I. Kern, her former counsel.

Respondent has contended that the Board never should have permitted the filing of the supplemental complaint since, she maintains, it made the case so expansive as to be indefensible. While the case after supplementation may have become more cumbersome, and the additional counts only reiterated the same conduct at issue in the original 26 patient counts, the added charges did reinforce the pattern. The Board finds its decision to permit the supplementation of the complaint made at its December 16, 1987 meeting was proper and notes that the Appellate Division on December 30, 1987, entered an order denying leave to appeal that decision.

Respondent, by way of her exceptions, renews her challenge to certain discovery determinations. She contends that Administrative Law Judge Weiss committed error in refusing to allow her to obtain medical records, maintained by doctors testifying on the State's behalf, for patients unrelated to the case.

Again, this decision was affirmed by the Board and upheld on appeal to the New Jersey Supreme Court. The trier of fact must retain the ability to determine the scope of the relevant inquiry lest the proceeding derail and become mired in extraneous matters. ALJ Weiss' efforts to contain the proceeding and focus on the issues at hand were, in our view, essential to the finalization of the case. Likewise, his decision to limit respondent's inquiry into the treatments rendered by other physicians to patients part of the complaint was proper. Respondent's patients were not on trial. That her patients might have experienced untoward symptoms during the course of prior or subsequent treatment is not pivotal to making a determination concerning the propriety of the care rendered by her while they were her patients.

Respondent also challenges a number of ALJ Weiss' evidentiary rulings. She objects to the ALJ's acceptance of affidavits from physicians not produced at trial. While the acceptance was within the ALJ's discretion, the Board has affirmed the dismissal of Counts XXVIII and XXIX. So too respondent has objected to the introduction of the transcript of an investigatory deposition occurring prior to the filing of charges. Although the introductions of those transcripts would appear proper, little or no reliance was placed on them. She also objects to the telephone testimony of several witnesses, although it appears that this course was consented to at the time.

Many of respondent's challenges center on the sanctions order entered March 21, 1988, which limited her ability to defend against those charges relating to patients whose medical records she had steadfastly refused to produce. First, she contends that this course was undertaken on advice of counsel and thus it should not be held against her. She offers no proof that counsel gave such advice nor any excuse for her failure to produce those records after his departure from the case. The sanctions order was simply the logical consequence of respondent's failure to cooperate with the orderly administration of the legal proceeding. Up until the date of the argument on exceptions before the Board, her new attorney was asking for additional time to bring in those records. The time for cooperation, however, had long since passed. Never once does it appear that respondent or any of her representatives were present

in court with the records in hand. We will not forestall the proceeding now, nor can we find error in how the sanctions order was entered or enforced. Indeed, the Appellate Division declined to disturb that sanction order on May 10, 1988.

Respondent also contends that Judge Weiss applied the order too broadly, arguing that he ought not to have found for the State simply because she was barred from presenting a defense. We note that Judge Weiss did dismiss the charges relating to excessive fees and thus did not apply the sanctions order in the way that respondent was argued. Indeed the Board, in turn, in the course of its review has reversed findings relating to M.L. Moreover, in light of the Board's alteration of the Administrative Law Judge's underlying premises, we find sufficient evidence to establish the violations found, and the refusal to reopen for the production of the records entirely proper.

Respondent's new counsel would have the Board alter the ALJ's decision because he contends his client was disadvantaged by her prior counsel's "abandonment." While the exit of Mr. Kern from the case against respondent's wishes was unfortunate and disruptive, we are convinced that ALJ Weiss made every effort to allow respondent to obtain appropriate counsel and, failing that to assure that as a *pro se* litigant she was fairly treated. Unfortunately, in many instances respondent did not avail herself of the protections which Judge Weiss afforded her. He could not force her to attend though her participation was clearly in her best interest.[12]

Certainly the course that this case took was far from ideal. We remain convinced however, that Administrative Law Judge Weiss made the best of a difficult situation. In sum, we believe respondent had an opportunity to fairly present evidence in her

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[12] We expressly reject respondent's argument that Administrative Law Judge Weiss was in any way biased after having been made aware of Mr. Kern's withdrawal motion. That matter was tried before another Administrative Law Judge and there is absolutely no evidence in the record of bias by the Judge. We are also satisfied that despite respondent's persistent attacks, no evidence of prosecutorial misconduct or witness fraud is shown.

defense and to protect her rights through a series of interlocutory challenges. We are satisfied that due process was afforded her and that the result was fair.

PENALTY

Notwithstanding his finding that respondent "in too many instances," "negligently managed her patient care," ALJ Weiss was convinced that her "conduct" was not the "product of any personal animus and/or criminal behavior" and thus a revocation of licensure not appropriate. While the Board agrees that revocation may be inappropriate here, it cannot concur with the "time served" model of discipline suggested by the ALJ. Nor does it deem acceptable the recommendation that upon completion of course work, respondent should be permitted to return to practice pursuant to an agreement to abide by a protocol for a period of time.

By his proposed disposition Administrative Law Judge Weiss has suggested that respondent take courses in general medicine and/or endocrinology or any other subject the Board might find valuable. In consideration of this record and respondent's background, the Board believes that such a directive misses the mark. It is not that respondent has not been taught appropriate practice. It is not that she is unaware that others practice differently. The problem is that she sees herself as exempt from having to "do it by the book." Accordingly, this Board will not order additional course work to be performed.

As ALJ Weiss noted respondent has unfortunately failed or refused to recognize that the best interests of her patients welfare were sometimes sacrificed unnecessarily. Her posthearing submissions would seem to validate Judge Weiss's concern that respondent "likely still believes" that her methods of treatment were appropriate. He was mindful that an unconditional restoration of licensure "potentially would lead to the same sort of situation which resulted in the filing of the Administrative Complaint." In light of respondent's seeming inability to accept that her actions had a deleterious impact on her patients and her steadfast refusal to abide by the directives issued by the ALJ to facilitate the

ongoing proceeding, the Board is convinced that a more watchful approach is warranted to assure that she will comply with our directives. Accordingly, it will not endorse the protocol as delineated in the proposed disposition set forth by ALJ Weiss. Rather it has determined that a more appropriate approach would be to permit respondent's reentry into practice in New Jersey in a supervised setting subject to a protocol to be established which would be tailored to the setting selected.

The Board concurs with Judge Weiss in his determination concerning the assessments of costs in this matter, imposing upon respondent the obligation of paying the investigatory costs and expert witness fees and half of the costs of the transcripts. In recognition of the substantial costs imposed upon respondent by this order, the Board has determined that the imposition of penalties is unnecessary. Accordingly, it has determined to waive the imposition of any penalty sum. With some misgivings and again being mindful of substantial costs here, the Board will not disturb the ALJ's decision to forgo the recoupment of monies paid by patients even though we do have some information with respect to a few patients.

For all the reasons set forth in this final decision and order,

IT IS on this 14th date of February, 1990,

ORDERED:

1. Respondent's license to practice medicine and surgery in the State of New Jersey shall be and is hereby suspended for a period of five (5) years effective September 23, 1987, the date on which limitations were placed upon respondent's license by Board order. The first two and one half (2-1/2) years of that period shall be served as an active suspension, the balance to be stayed, provided respondent complies with the restraints, limitations and other terms set forth herein or further delineated by subsequent Board order.

2. Upon the completion of the 2-1/2 years of active suspension respondent shall have leave to present to the Board a proposal for reentry into the practice of medicine in an institutional setting subject to supervision by a plenary license

physician acceptable to the Board and subject to limitations and protocols as the Board may deem appropriate in the practice context. The protocol proposed must assure that respondent make sufficient effort to ascertain a patient's current physical status prior to the initiation or alteration of a therapeutic plan. That proposal must further assure that respondent collaborates with other treating physicians in the rendition of patient care and will be accessible and available to provide appropriate follow-up and emergent care to her patients.

3. Respondent shall pay costs to the State in the sum of $75,127.49 ($20,415.02, Enforcement Bureau investigatory costs, $33,883.75 expert witness fees and $20,828.72 (half of the costs of transcripts)). She may apply to the Board for permission to pay this sum in equal monthly installments of $2,504.25, during each month in which the suspension of licensure has been stayed to be paid by check or money order on or before the 23rd day of each month beginning on March 23, 1990, the date on which respondent has leave to apply for reentry into practice, which application shall be supported by evidence of financial hardship and shall identify appropriate collateral. In the event that Dr. Brayshaw fails to make any required payment when due, the remainder shall be due and payable. A Certificate of Debt shall be filed pursuant to *N.J.S.A.* 45:1-24 upon the entry of this order.

4. Should respondent choose not to avail herself of the option to reenter the practice of medicine and surgery in the State of New Jersey on or about March 23, 1990, or at any time during the remainder of the suspension period, she must nevertheless, even upon completion of the entire period of suspension, submit a proposal for reentry for Board approval, before reentering the practice of medicine in this State.

NEW JERSEY STATE BOARD OF
MEDICAL EXAMINERS

By: /s/ Michael B. Grossman, D.O.
Michael B. Grossman, D.O.

STATUTORY PROVISIONS INVOLVED

Titles 45 and 52 of New Jersey Statutes Annotated (1991) provide in pertinent part:

45:1-10. Disclosure of laboratory payments on bills to patients and third party payors

It shall be unlawful for any person licensed in the State of New Jersey to practice medicine or surgery, dentistry, osteopathy, podiatry or chiropractic to agree with any clinical, bio-analytical or hospital laboratory, wheresoever located, to make payments to such laboratory for individual tests, combination of tests, or test series for patients unless such person discloses on the bills to patients and third party payors the name and address of such laboratory and the net amount or amounts paid or to be paid to such laboratory for individual tests, combination of tests or test series.

45:1-21. Grounds for refusal to admit to examination or denial, suspension or revocation of any certificate, registration or license

A board may refuse to admit a person to an examination or may refuse to issue or may suspend or revoke any certificate, registration or license issued by the board upon proof that the applicant or holder of such certificate, registration or license

a. Has obtained a certificate, registration, license or authorization to sit for an examination, as the case may be, through fraud, deception, or misrepresentation;

b. Has engaged in the use or employment of dishonesty, fraud, deception, misrepresentation, false promise or false pretense;

c. Has engaged in gross negligence, gross malpractice or gross incompetence;

d. Has engaged in repeated acts of negligence, malpractice or incompetence;

e. Has engaged in professional or occupational misconduct as may be determined by the board;

f. Has been convicted of any crime involving moral turpitude or any crime relating adversely to the activity regulated by the board. For the purpose of this subsection a plea of guilty, non vult, nolo contendere or any other such disposition of alleged criminal activity shall be deemed a conviction;

g. Has had his authority to engage in the activity regulated by the board revoked or suspended by any other state, agency or authority for reasons consistent with this section;

h. Has violated or failed to comply with the provisions of any act or regulation administered by the board;

i. Is incapable, for medical or any other good cause, of discharging the functions of a licensee in a manner consistent with the public's health, safety and welfare.

45:1-22. Additional or alternative penalties to revocation, suspension or refusal to renew; temporary order suspending or limiting license; subpena

In addition or as an alternative, as the case may be, to revoking, suspending or refusing to renew any license, registration or certificate issued by it, a board may, after affording an opportunity to be heard:

a. Issue a letter of warning, reprimand, or censure with regard to any act, conduct or practice which in the judgment of the board upon consideration of all relevant facts and circumstances does not warrant the initiation of formal action;

b. Assess civil penalties in accordance with this act;

c. Order that any person violating any provision of an act or regulation administered by such board to cease and desist from future violations thereof or to take such affirmative corrective action as may be necessary with regard to any act or practice found unlawful by the board;

d. Order any person found to have violated any provision of an act or regulation administered by such board to restore to any person aggrieved by an unlawful act or practice, any moneys or property, real or personal, acquired by means of such act or

practice; provided, however, no board shall order restoration in a dollar amount greater than those moneys received by a licensee or his agent or any other person violating the act or regulation administered by the board;

e. Order any person, as a condition for continued, reinstated or renewed licensure, to secure medical or such other professional treatment as may be necessary to properly discharge licensee functions.

A board may, upon a duly verified application of the Attorney General alleging an act or practice violating any provision of an act or regulation administered by such board, enter a temporary order suspending or limiting any license issued by the board pending plenary hearing on an administrative complaint; provided, however, no such temporary order shall be entered unless the application made to the board palpably demonstrates a clear and imminent danger to the public health, safety and welfare and notice of such application is given to the licensee affected by such order.

In any administrative proceeding commenced on a complaint alleging a violation of an act or regulation administered by a board, such board may issue subpenas to compel the attendance of witnesses or the production of books, records, or documents at the hearing on the complaint.

45:9-16. Refusal to grant, suspension or revocation of license, or registration of certificate or diploma; grounds procedure; relicense

The board may refuse to grant or may suspend or revoke a license or the registration of a certificate or diploma to practice medicine and surgery filed in the office of any county clerk in this State under any act of the Legislature, upon a showing of the preponderance of the credible evidence that the holder of such license

(h) has been guilty of gross malpractice or gross neglect in the practice of medicine which has endangered the health or life of any person.

52:14B-10. Evidence; judicial notice; recommended report and decision; final decision; effective date

In contested cases:

(a) The parties shall not be bound by rules of evidence whether statutory, common law, or adopted formally by the Rules of Court. All relevant evidence is admissible, except as otherwise provided herein. The administrative law judge may in his discretion exclude any evidence if he finds that its probative value is substantially outweighed by the risk that its admission will either (i) necessitate undue consumption of time or (ii) create substantial danger of undue prejudice or confusion. The administrative law judge shall give effect to the rules of privilege recognized by law. Any party in a contested case may present his case or defense by oral and documentary evidence, submit rebuttal evidence and conduct such cross-examination as may be required, in the discretion of the administrative law judge, for a full and true disclosure of the facts.

(c) All hearings of a State agency required to be conducted as a contested case under this act or any other law shall be conducted by an administrative law judge assigned by the Director of the Office of Administrative Law, except as provided by this amendatory and supplementary act. A recommended report and decision which contains recommended findings of fact and conclusions of law and which shall be based upon sufficient, competent, and credible evidence shall be filed, not later than 45 days after the hearing is concluded, with the agency in such form that it may be adopted as the decision in the case and delivered or mailed, to the parties of record with an indication of the date or receipt by the agency head; and an opportunity shall be afforded each party of record to file exceptions, objections, and replies thereto, and to present argument to the head of the agency or a majority thereof, either orally or in writing, as the agency may order direct. The head of the agency, upon a review of the record submitted by the administrative law judge, shall adopt, reject or modify the recommended report and decision no later than 45 days after receipt of such recommendations. Unless the head of the agency modifies or rejects the report within such period, the

decision of the administrative law judge shall be deemed adopted as the final decision of the head of the agency. The recommended report and decision shall be a part of the record in the case. For good cause shown, upon certification by the director and the agency head, the time limits established herein may be subject to extension.

52:14B-11. Revocation or refusal to renew license; hearing

No agency shall revoke or refuse to renew any license unless it has first afforded the licensee an opportunity for hearing in conformity with the provisions of this act applicable to contested cases. If a license has, in accordance with law and agency rules, made timely and sufficient application for a renewal, his license shall not expire until his application has been finally determined by the agency. Any agency that has authority to suspend a license without first holding a hearing shall promptly upon exercising such authority afford the licensee an opportunity for hearing in conformity with the provisions of this act. . . .

FILED
JUL 27
OFFICE OF

No. 91-2067

In The

Supreme Court of the United States

October Term, 1992

NORA D. BRAYSHAW, M.D.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

Petition For A Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION ON BEHALF OF RESPONDENT STATE OF NEW JERSEY, STATE BOARD OF MEDICAL EXAMINERS

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July 27, 1992

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QUESTIONS PRESENTED

1. Has due process under the Fourteenth Amendment to the United States Constitution been violated by the State of New Jersey State Board of Medical Examiners where the Board ordered a temporary suspension of the license of a physician whose self-styled "bio-psychiatry" practice was found to constitute an imminent peril to the public, where the Board provided an opportunity for immediate reinstatement of the physician's license on condition that she refrain from the specific conduct alleged to constitute the peril, and where the physician at all times refused to practice under those limitations and, via a calculated defense "strategy of attrition," succeeded in delaying final disposition of the case?

2. Has due process under the Fourteenth Amendment to the United States Constitution been violated by the New Jersey State Board of Medical Examiners where the Board exercised its regulatory authority to protect the public welfare by directing petitioner to produce her own patient records which she is required by Board rule to prepare, maintain and produce for inspection, for those patients alleged in the disciplinary proceedings to have been subjected to gross and repeated malpractice by Brayshaw, where the Board did not compel those patients to produce their medical records of treatment by non-testifying physicians uninvolved in the case in recognition of the privacy interests of those patients, and where the Board authorized the Administrative Law Judge to exercise judicial discretion to nevertheless compel release of records deemed highly relevant to the defense, which discretion was exercised?

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The Writ should be denied because the decision of the Superior Court of New Jersey, Appellate Division, affirming the Final Decision of the New Jersey State Board of Medical Examiners, raises no special and important matters, and is consistent with State and Federal requirements of due process in administrative proceedings of agencies entrusted with professional licensure and disciplinary responsibilities. Petitioner has presented no special and important reason for review by this Court, as delay in the final disposition of this particular contested administrative law case was caused directly by petitioner and/or the trial strategy of her own attorneys.

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NORA D. BRAYSHAW, M.D.,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION ON BEHALF OF RESPONDENT STATE OF NEW JERSEY, STATE BOARD OF MEDICAL EXAMINERS

COUNTERSTATEMENT OF THE CASE

Petitioner Nora Brayshaw, M.D. seeks to avoid the consequences of her repeated malpractice as to thirty-one patients of whom fourteen suffered gross malpractice, as well as from her misrepresentation and professional misconduct in her medical practice which the Administrative Law Judge/Board of Medical Examiners and the Appellate Division of the Superior Court of New Jersey found

to be amply documented by the record developed in a 56-day hearing.[1]

Following an investigation during which Dr. Brayshaw was represented by an attorney,[2] Brayshaw

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[1] As used herein, Pb refers to petitioner's brief; Pa refers to petitioner's appendix; PaE refers to petitioner's exhibits filed separately with the Court Clerk, which include integral portions of the Board's Final Decision omitted from Pa12.

RaE refers to an appendix of respondent Board's exhibits, one copy of which has been filed with the Court Clerk, which contains highly significant pages of the Administrative Law Judge's Initial Decision listing all evidence exhibits at trial – all of which pages were omitted by petitioner from her appendix and from her separate exhibits, and other documents of importance in this case. RbNJ refers to respondent Board's brief filed with the Superior Court of New Jersey, Appellate Division; RaNJ refers to respondent Board's appendix filed with the Superior Court of New Jersey, which included these RaE exhibits.

[2] Upon notification of the imminent service of the Verified Complaint seeking emergent temporary suspension, Dr. Brayshaw discharged her first attorney Matthew P. Boylan, Esq. (RaE"395"). She appeared *pro se* at the Board hearing, accompanied by her lawyer husband David Brayshaw who disclaimed representation of her at that time. She was thereafter represented before the Board and the Office of Administrative Law by Steven I. Kern, Esq.(Ra13). After Mr. Kern's departure following 26 days of the hearing, Brayshaw presented George Kovacs, Esq. to serve as "partial attorney" along with her husband in the conduct of the hearing. Since Mr. Kovacs refused to take legal responsibility for the defense, however, the ALJ declined to permit him to serve as partial counsel. Next, Brayshaw offered Clifford P. Sheehan as nominal counsel of record with her husband David Brayshaw admitted *pro hac vice* (RaE404-405). After that designation was

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was served with a detailed Verified Complaint and extensive supporting investigative materials seeking temporary suspension of her license by the State Board of Medical Examiners.[3] The Complaint included certifications/affidavits of 12 treating physicians regarding 26 patients, 9 patient/family certifications,[4] and examples of Brayshaw's patient records. She was charged with gross and repeated negligence by her prescribing of Synthroid

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revoked for misconduct, and Brayshaw discharged both her husband and Mr. Sheehan, she represented herself *pro se*. In October 1989, she named Cardonsky and Carroll, Esqs. as her new attorneys to present oral argument on her filed Exceptions (Pa14). Then she retained the firm of White and Williams to represent her on appeals to the Appellate Division and the New Jersey Supreme Court (Pa2). Present counsel Cravath, Swaine & Moore thus constitute the seventh set of attorneys for her in this matter.

[3] The Board of Medical Examiners is an administrative agency within the executive branch of the government in the Department of Law and Public Safety. It is composed of licensed physicians and other health care professionals and public members designated by *N.J.S.A.* 45:1-2.2 and *N.J.S.A.* 45:9-1, appointed by the Governor. Petitioner is grossly in error in describing the Board as a "private association of medical practitioners" (Pbii).

[4] Contrary to petitioner's unsupported claim (Pb3) that inquiry was started "at the behest of competing endocrinologists", she is aware, via discovery provided, that investigation was begun after receipt of complaint from a distraught patient, E.J. This was soon amplified by an avalanche of independent information from various kinds of physicians reporting treatment of former Brayshaw patients who had consulted for distress, including thyrotoxicosis, following her prescribed and unmonitored Synthroid program (RaE1-6).

(a synthetic thyroid hormone) without physical examination and at substantial dosages; with failing to appropriately monitor those patients; and failure to be available to and respond to patients experiencing significant adverse symptoms. She was also charged with misrepresentation and deception by issuing laboratory reports with altered references ranges, on letterhead of "DNB Laboratories," an entity owned by Brayshaw and her husband, when there was in fact no such actual laboratory and DNB itself had not performed the lab tests (RaE1-2). Two Supplemental Complaints were thereafter filed, alleging gross and repeated malpractice regarding 14 additional patients; the sending of a letter to each patient involved in the Complaints attempting to intimidate them from testifying; and the mailing by Brayshaw to her patients of a document prepared by a subsequent treating physician of three of her patients, which document Brayshaw truncated in such manner as to make it appear falsely that the other doctor was in favor of her treatment (RbNJ2).

At the temporary suspension hearing, the Board considered the Attorney General's evidence, the documentary material submitted by Dr. Brayshaw and her own testimony acknowledging her style of practice. The Board concluded that continued unrestricted practice by her posed a clear and imminent danger to the public, and entered an order September 9, 1987 pursuant to *N.J.S.A.* 45:1-22 temporarily suspending her license and barring her from prescribing Synthroid but indicating that the Board would permit her to practice under specified conditions which would promote protection of the public in the interim (RaE1 to 8). By its terms, the Order did not

become effective until September 23, 1987 to allow Brayshaw time to appeal. When she did, much later, choose to appeal the temporary suspension, after review of the case her emergent application for stay was denied by the Appellate Division of the Superior Court of New Jersey (RaE9). Nor did she immediately then – or ever – choose to resume practice on the protective terms of the Board Order; her license therefore remained suspended since that date and until the conclusion of the case (Pa3). Within a week of the effective date of the Order, the Board transferred the case to the Office of Administrative Law (OAL) for trial (Pa4).[5]

The OAL initially scheduled a prompt series of 28 hearing dates; 16 of those days were later cancelled at the request of Brayshaw's attorney (See, in part, PaE396 to 403). Other cancellations were: 1 day for a State holiday, 1 day at Complainant's request[6], 1 day for illness of

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[5] Brayshaw's request for "accelerated hearing" was thereafter denied (Ra100). That procedural option is reserved for uncomplicated cases and, as defined in OAL rule *N.J.A.C.* 1:1-9.4, requires that the case be conducted **without** discovery and **without** submission of post-hearing briefs, and with a 15-day limit for issuance of the ALJ Initial Decision and for Final Decision by the Board. Both the ALJ and the Board found that rule inappropriate for a 40-patient medical malpractice and professional misconduct case (Ra100). The Board did order the hearing schedule expedited (Ra100), and it was accordingly scheduled at the OAL in precedence over other cases, commencing November 30, 1987 (Pa13).

[6] The prosecuting Deputy Attorney General needed to attend a motion in the separate proceeding filed by the Brayshaws in the District Court of New Jersey, Docket No.

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Administrative Law Judge (ALJ) Weiss coupled with the seeking, by Brayshaw's then counsel Steven Kern, of leave to appeal an order with the Appellate Division of Superior Court. One other break resulted when the OAL Director required that another interrupted Medical Board case be concluded because it involved seven defendants and their attorneys including Dr. Brayshaw's then counsel and the prosecuting Deputy Attorney General on behalf of the Attorney General.

Trial speed was also controlled by Brayshaw's admitted defense of a "strategy of attrition" against the Attorney General's witnesses: e.g., the defense conducted 5.5 days of cross-examination of expert-plus-fact witness Dr. Robert Rosenbaum for 2 days of his direct examination about 5 patients, and 10 days of cross-examination of expert Dr. William Green for 4.5 days of his direct examination on 10 patients (RaE10; RbNJ9).[7]

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88-126 against every individual member of the Board of Medical Examiners, 1 medical office, 2 hospitals, every physician who had provided an affidavit to the Enforcement Bureau during the investigation, a Bureau investigator, and the prosecuting D.A.G. The Hon. Nicholas H. Politan, U.S.D.J., abstained from entertaining the merits of the Complaint pending the final outcome of the State proceedings then underway and denied the Brayshaw's application for preliminary injunctive relief. He terminated the case administratively, ruling that it may be reactivated upon conclusion of the State administrative and judicial proceedings (RbNJ10).

[7] Petitioner suggests at Pb 6 that her attorney Steven I. Kern was "overwhelmed by the bulk of repetitious counts, the

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The trial continued to be protracted, again by Brayshaw's own doing, after Attorney Kern left the case. After Brayshaw's voluntary and secretive departure from New Jersey, she wrote specifically requesting that only two witnesses be scheduled per day (Ra12). But thereafter, Brayshaw never informed the ALJ or the Attorney General when she might choose to appear at trial; the ALJ consequently delayed the start of trial each morning to see if Brayshaw would appear. Ultimately, Brayshaw wrote to the ALJ waiving cross-examination on any day that she was not present in court (Ra14). In fact, she did not appear until the last few days of trial. The totality of this conduct resulted in many of the extra trial dates which had to be arranged and fitted into the heavy schedule of ALJ Weiss (who was also the OAL Assignment Judge).[8]

(Continued from previous page)

pace of the process, and Brayshaw's depleting funds." In fact, Mr. Kern's moved on the 27th day of trial to withdraw as counsel because of substantial misrepresentations allegedly made to him by Brayshaw in addition to non-payment. The entirety of those proceedings was conducted separately and then sealed by the Hon. K. Springer, an independent ALJ specially assigned, to avoid affecting the ongoing trial before the Hon. Steven Weiss, ALJ and the Board of Medical Examiners. In the course of the withdrawal proceedings, Brayshaw offered into evidence her letter to Mr. Kern dated April 21, 1988, marked NB3 in Evd, approving his "strategy of attrition rather than pushing to streamline and expedite the case" (Ra9).

[8] Petitioner complains of "erratic scheduling of trial days" (Pb7). In fact, in addition to conference calls by the ALJ with regard to certain specific dates, a specific schedule of dates as contiguous as possible was sent to her by the OAL in advance.

During the course of the 56-day trial at the Office of Administrative Law and thereafter, there were over 226 exchanges of correspondence and orders issued by the ALJ and by the Board, in addition to multiple motions made by Brayshaw to the Appellate Division, which were denied. Brayshaw was provided ample opportunity to be aware of all charges against her, to know the evidence to be presented on the charges and to cross-examine witnesses against her. Brayshaw was provided the opportunity to subpoena witnesses and records within the provision of rules of the OAL and of the New Jersey Supreme Court, and to present her own defense through fact and expert witnesses, even to the extent of allowing her to present a transcript of earlier testimony at the Board's second emergent suspension hearing, which had not permitted full cross-examination by the Attorney General. (A small sample of the hundreds of documents was provided in the appendix, volumes I and II, submitted by the Board to the Appellate Division of Superior Court at RbNJii to vi).

Careful attention was paid at trial to the issue of Brayshaw's patient records and her own informed refusal to release almost 1/3 of them, and the warning and implementation of consequences of that refusal (Pa52-53; RaNJ 112-114; RbNJ9-11). Those matters had earlier been reviewed interlocutorily by the Appellate Division which then denied her leave to appeal (RaNJ119,120). In its decision on the merits of Brayshaw's appeal, the Appellate Division found the sanctions order "clearly warranted" as well as not to have greatly affected the outcome of the case (Pa10).

Special attention was further given to Brayshaw's demand, with regard to all patients listed in the Complaint, for all medical records prepared for them by treating doctors before and after her own treatment, although the Attorney General's case did not rely upon testimony or records from physicians uninvolved in the trial. The Board, by Order issued December 16, 1987, rejected Brayshaw's demand for such records, but nevertheless recognized that there may be circumstances when records of non-testifying physicians may include potentially highly relevant information, and authorized the ALJ to make a careful and reasoned ruling on such applications as might be presented in the future (Pa51,52). As the Board noted, "Respondent's [Brayshaw's] patients were not on trial" (Pa52). The ALJ did in fact exercise that discretion regarding numerous records and made individualized determinations when records or parts thereof might warrant release to Brayshaw.[9] The entirety of the Board's December 16, 1987 Order, including the rulings denying "accelerated hearing" in the circumstances of this case, denying Brayshaw's demand for subpoenaes to testifying doctors to release records of their own patients

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[9] The ALJ signed numerous administrative subpoenaes at Brayshaw's request, and later found it necessary to require her to attach a cautionary letter with subsequent subpoenaes when it became apparent that she was routinely violating the terms of the ALJ Order regarding access to otherwise confidential medical records from physicians uninvolved in the case (RaNJ205). Many of the records provided to her are noted in the ALJ Exhibit List (RaE19), which Brayshaw has failed to provide to this Court although it was part of the ALJ's Initial Decision.

who were **not** involved in the case, and authorizing exercise of ALJ discretion regarding Brayshaw's access to records of **non-testifying** treating doctors for patients who were involved in the case, was affirmed on March 31, 1988 by the New Jersey Supreme Court (RaNJ109).

At the conclusion of trial, the ALJ prepared a 177-page Initial Decision, to complete which he needed and received one extension of time; it was filed on September 1, 1989 (RbNJ19). The ALJ found numerous violations of the Uniform Enforcement Act, *N.J.S.A.* 45:1-21, and the Truth-in-Laboratory Billing Act, *N.J.S.A.* 45:1-10, and concluded that Brayshaw needed extensive retraining and significant limitations on any future practice (PaE270 to 274). The ALJ also assessed penalties and costs (PaE274-275). On October 6, 1989 the Board sought and received one extension of time for determination of final decision, in order to adequately review the voluminous trial record (RbNJ19). On November 8, 1989 the Board announced its findings of fact and conclusions of law on the public record, to be followed by a 58-page written Order memorialized February 14, 1990 and filed February 29, 1990 (Pa12). Factual corrections were made to the Order, filed March 14, 1990.[10]

Contrary to petitioner's selective and minimized description of the Board's findings (Pb3), in fact Brayshaw was found guilty of many instances of gross

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[10] Petitioner has attached at 12a the **uncorrected** version of the Board Order. Among the highly significant differences was the corrected number of days when Brayshaw was represented by Attorney Kern at trial: 26, not 19 (compare Petitioner's Appendix 13a).

malpractice as well as repeated malpractice in the manner by which she prescribed for and treated her patients, not only with Synthroid but with strong psychoactive drugs; she sought to "wrap herself in the protective cloak of 'consultant' " (Pa44), but in fact she was not acting as a traditional psychiatrist providing psychological therapy; she held herself out as a "biopsychiatrist" providing "neuroendocrine consultation," yet she refused to examine patients, and she prescribed medication to her patients without assuring that their physical status was initially and periodically ascertained by a responsible physician who could consult with her (Pa21-22,4849). Desperate patients tried to contact her to report severe adverse symptoms; the Board noted "the callous response with which their pleas for help were met" (Pa21-22). The Board also found that Brayshaw had misrepresented and had violated the Laboratory Truth-in-Billing Law, *N.J.S.A.* 45:1-10, by failing to disclose the actual laboratory which had performed the lab tests she ordered (Pa23-25). She had also secretly altered, for her spurious "DNB Labs" reports, the true reference ranges which had been utilized in the reports from the original labs. Thus, as the ALJ had succinctly phrased it: "As it was, the patient did not know that a value shown to be outside DNB's range of 'normal' was not outside the testing laboratory's 'normal' range. This was wrong" (PaE132). Brayshaw was also found to have engaged in misrepresentation and professional misconduct in truncating the original written material from endocrinologist Dr. Joel Ehrenkranz (who had treated 3 of Brayshaw's patients suffering from excess Synthroid), to falsely make it appear that he was in favor of her method of treatment (Pa50,51).

The Appellate Division considered each of the issues raised by Brayshaw: the purported denial of an effective hearing at the temporary license suspension proceeding and of certain discovery she had demanded; the lengthy temporary suspension of license; the filing of the two Supplemental Complaints; as well as the length of the hearing process. In the circumstances of this case, the Court found none of her claims to have merit (Pa8 to 11). The Court noted the extensive chronology by which Brayshaw had been informed of the charges and the conducting, at Brayshaw's request, of a special second emergent hearing on the temporary suspension application at which she presented expert witnesses prior to the OAL trial. The recommendation to continue the suspension had been specifically reviewed by the Appellate Division which then denied her motion for a stay and dismissed her appeal as interlocutory. The Court also found that much of the delay in the trial was engendered by Brayshaw's difficulty with her own counsel and her own move to California (Pa10). The Court further concluded that there were

> overwhelming efforts by the ALJ to be fair and impartial and to afford Dr. Brayshaw every opportunity to meet the serious allegations of the complaint. The complaint itself was explicit as to the charges so that any deprivation of discovery does not appear to have been harmful. As to the unfortunate length of time that the temporary suspension lasted, appellant steadfastly refused to accede to the seemingly reasonable conditions under which she could have continued her practice [Pa10].

All the other procedural and substantive issues advanced by Brayshaw, identical to those raised before this Court, were found by the Appellate Division to be without merit (Pa11) and it affirmed the Board Order. The New Jersey Supreme Court denied Brayshaw's petition, with costs (Pa1).

SUMMARY OF ARGUMENT

The Writ sought herein should be denied because petitioner has failed to demonstrate that the decision of the State Board of Medical Examiners, which was affirmed by the Appellate Division of the Superior Court of New Jersey, and was found without merit for certification by the Supreme Court of New Jersey, meets any of the jurisdictional requirements of Rule 10. The decision does not conflict with any due process requirements imposed by the 14th Amendment of the United States Constitution which would be applicable to the State. Rather, in deciding that Brayshaw had been given a fair trial and that the decision was well supported by the evidence presented, the Board and the New Jersey Appellate Division properly interpreted and applied the law governing due process in licensure disciplinary proceedings. The decision raises no important question of federal law which has not been, but should be, settled by this Court.

Contrary to petitioner's contentions, Dr. Brayshaw was accorded, throughout, not merely standard discovery and trial procedures applicable to all litigants in New Jersey disciplinary proceedings, but in fact was accorded

special accommodation in many respects by the trial judge and the Board. Due process was accorded in the Board's proper finding that she was guilty of instances of gross and repeated negligence in her treatment of numerous patients, professional misconduct in her dishonest truncation of a witness' affidavit, and failure to comply with the Truth-in-Laboratory Billing law of New Jersey when deceiving her patients about her hidden financial interest in a "laboratory" to which she referred her patients for testing, which laboratory was in fact a sham entity.

Even if delay in disposition of a contested administrative law case were, in unusual circumstances, deemed to warrant judicial relief, no such relief is warranted in this case where the primary delays were caused directly by petitioner and/or her own attorneys.

Since the decisions below are entirely consistent with constitutional requirements for due process in licensure disciplinary proceedings, no basis exists for granting review of the writ of certiorari.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, AFFIRMING THE FINAL DECISION OF THE NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS, AND TO WHICH THE SUPREME COURT OF NEW JERSEY DENIED CERTIFICATION, IS FULLY CONSISTENT WITH STATE AND FEDERAL REQUIREMENTS OF DUE PROCESS IN ADMINISTRATIVE PROCEEDINGS OF AGENCIES ENTRUSTED WITH PROFESSIONAL LICENSURE AND DISCIPLINARY RESPONSIBILITIES.

This case involved a peculiar medical fact pattern and also a peculiar procedural pattern, both resulting primarily or exclusively from the conduct of petitioner herself. The medical facts are virtually unique in Board case history: a self-styled biopsychiatrist who makes endocrine deficiency diagnoses on patients whom she refuses to physically examine; makes diagnoses based on results she presents in fraudulently prepared lab reports; and who refuses to accept desperate calls from patients taking the prescribed large doses of Synthroid when the patients are suffering signs cumulatively indicative of thyrotoxicity while on the medication, such as chest pain, sweating, palpitations, severe headache, agitation, diarrhea, tremor and other symptoms.[11] (See ALJ Initial Decision, PaE100 to 257 and Board Decision, Appendix Pa21 to 55).

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[11] Petitioner refers at Pb7 to this panoply of horrors as "mild health effects" of her prescribed Synthroid treatment.

The case was procedurally unique in that Brayshaw deliberately chose a "strategy of attrition" to drag on the case while still represented by counsel; then removed herself from the State without notice to the ALJ or Complainant Attorney General; kept her whereabouts unknown except through a post office box and her husband's California office telephone; regularly sent lengthy facsimile complaints to the ALJ – often without notice to Complainant Attorney General; prior to the Initial Decision had professional relationships with five different attorneys and then represented herself *pro se,* but never told the ALJ or Complainant when she would or would not appear in Court; and insisted on Complainant presenting only two witnesses per day but still failed to appear personally at trial until the last few days.

Brayshaw again here repeats her contention below that she was denied due process at her temporary suspension hearing. Although opportunity for such hearing is not even required in certain cases where there is an important government interest accompanied by substantial assurance that the deprivation is not baseless or unwarranted, *Federal Deposit Insurance Corporation v. Mallen,* 486 *U.S.* 230 (1988), citing *Barry v. Barchi,* 443 *U.S.* 55 (1979), nevertheless, Brayshaw was in fact given fair notice of and opportunity to contest the initial temporary suspension proceedings and to appeal the decision. The Appellate Division denied her emergent application for stay of the Board Order and she did not further appeal that determination (RaNJ90). It must also be noted that Brayshaw continues to ignore the fact that the Board's suspension order did not foreclose her opportunity to practice medicine, provided that she conformed to the

minimum protective provisions the Board found essential. Later in the trial, she again moved to vacate the temporary suspension without accepting the protective provisions; that motion was carefully considered and denied by the ALJ and affirmed by the Board, which found her proposed continuation of her previously alarming practice would **still** constitute peril to the public (RaNJ132,139).

Brayshaw contends that her rights to due process were abridged because there is no **pre-determined** date for a definite conclusion of a disciplinary proceeding. Clearly, no such date could be established by law, as trial lengths will vary depending on the number of charges, witnesses, trial tactics, and judicial evaluation of the evidence and post-hearing briefs, among many other considerations. Brayshaw's citation of *Ampuero v. Dep't of Professional Regulation,* 410 (*So.*2d 213 (Fla.1982) is inapt, as no date had there been set for trial for an extended period of time. By contrast, here the Board of Medical Examiners promptly transferred the case to the OAL which commenced trial November 30, 1987. Petitioner's citation of *Gershenfeld v. Justices of the Supreme Ct. of Pa.,* 641 *F.Supp.* 1419 (E.D.Pa.1986), where **no** time limits were established for final decision in a case, is entirely inapt to this matter where Brayshaw's case was governed from the outset by New Jersey's Administrative Procedure Act, *N.J.S.A.* 52:14B-10(c) which, along with *N.J.A.C.* 1:1-18.1 specifies the timeframe of 45 days from the close of the hearing to issuance of the Initial Decision. That date may be extended, only for good cause shown, by the Director of the OAL. Good cause was shown here, in light of the large number of issues and volumes of trial testimony

and evidence which the ALJ had to address. *N.J.A.C.* 1:1-18.1 similarly permits extension of the 45 days which are otherwise set for issuance of the final decision of the agency; good cause was demonstrated for that single extension in this case as well. Brayshaw's argument at each level of appellate review in New Jersey was properly found to be without merit, and similarly does not constitute a violation of the Fourteenth Amendment.

Where delay in completion of the hearing does occur, that delay "cannot be evaluated in a vacuum." *Mallen, supra,* at 486 *U.S.* 242. Well recognized factors must be considered in determining "what process is due to protect against an erroneous deprivation" of a property interest. *Mathews v. Eldridge,* 424 *U.S.* 319 (1976). In evaluating the significance of the delay, it is appropriate to examine the importance of the private interest and the harm occasioned by the delay, the justification offered by the Government and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken. *Mallen* at 242. As recognized in *Mallen,* the case may be a serious one and may involve complex issues and an extensive evidentiary record; *Id.* at 244. That was certainly the case here. As in *Mallen,* one must consider the magnitude of the public interest in a correct decision, *Id.* at 244, - here, by the Medical Board in light of the broad scale of the malpractice and misrepresentations charged (and ultimately largely proved). Also, as in *Mallen* at 244, greater weight may be given to the public interest, especially where injury to the suspended person's reputation is not likely to be augmented beyond that caused by the original public order of suspension;

here, an Order which the Appellate Division saw fit not to disturb. Thus, there was no denial of due process in the circumstances of this case.

Significantly, as the Appellate Division recognized, Brayshaw retained throughout these proceedings the ability to resume an appropriate medical practice, merely by conforming to the protective conditions set by the Board at the initial temporary suspension, conditions the Appellate Division found "reasonable" (Pa10). She failed, however, to exercise that right.

Nor were any of petitioner's due process rights violated by denial of discovery to which she was entitled. She was provided with discovery material regarding every expert and/or fact physician-witness who provided subsequent treatment to Brayshaw's patients and who testified on behalf of Complainant, and their records for those patients were available except as otherwise prohibited by law.[12] Brayshaw's contention that there were "different" standards of discovery and that this prejudiced her by denying access to records which she demanded for cross-examination (which she did not trouble to attend), related primarily to her demand that she be allowed to inspect the treatment records of those doctors as to their own patients **not** involved in the Complaint, as well as to preceding and subsequent treating doctors not involved in the case and not called to testify (Pa51-52). The Board determined, in an interlocutory order, that such access to confidential records of other persons is not appropriate

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[12] This was a single instance of examination, not treatment, of the child M.T. by Dr. Kriedman for a school child study team.

for, among other reasons, the non-pertinence to the charges against Brayshaw and also the chilling effect such a procedure would have on any expert witnesses. The ALJ was, however, given discretion to require production of records as maintained by non-testifying other treating doctors of those patients who were involved in the case even if the patients had not so consented, in unusual situations when such records are believed to include highly relevant information. The ALJ in such circumstances was instructed to make a careful and reasoned ruling on any such applications by Brayshaw. Pursuant to this Order, Brayshaw received numerous other-doctor records (RaE16 to 28, omitted by petitioner from the ALJ's Initial Decision trial exhibit list, PaE). The Board decision on those issues was ultimately affirmed by the New Jersey Supreme Court on April 4, 1988 (RaNJ109). With regard to Brayshaw's due process contentions, respondent State also notes the fact, extensively addressed by the ALJ in telephone conference calls as well as correspondence to Brayshaw, that she failed (without notice) to appear to conduct cross-examination for most of the witnesses (RaNJ196,207).

In summary, the Appellate Division reviewed the extensive record amassed at the levels of the several emergent proceedings before the Medical Board (in addition to the OAL), and the voluminous trial record amassed before the Administrative Law Judge, the numerous motions resulting in 20 different orders issued by the ALJ and the Board during the proceedings, the lengthy records presented on the 5 separate appeals to the Appellate Division considering Brayshaw's numerous motions, and the record before the New Jersey Supreme

Court, and Brayshaw's multiple motions post-Board Decision and prior to the Appellate Division decision. The Appellate Division found that the Administrative Complaint was explicit, and that Court expressed satisfaction that the proceedings before the Office of Administrative Law gave Brayshaw a full and fair opportunity to present witnesses in her own behalf, to cross-examine and rebut testimony and to present affirmative defenses before an objective factfinder (Pa10). In addition to concluding that the Board's findings and conclusions (of misrepresentation, gross and repeated negligence and professional misconduct and violations of the Laboratory Truth-in-Billing Law) were supported by sufficient evidence in the record, the Appellate Division specifically found that due process had been accorded Brayshaw at every level, despite the extraordinary burdens she had placed on the ALJ and the Board by her departure from the State in the midst of trial.

Petitioner has failed to demonstrate that this case satisfies any of the criteria for *certiorari* and thus, further review is inappropriate and unnecessary.

CONCLUSION

For the above stated reasons, it is respectfully submitted that the petition for certiorari should be denied.

Dated: July 27, 1992

Respectfully submitted,

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No. 91-2067

IN THE
Supreme Court Of The United States
October Term, 1991

NORA D. BRAYSHAW, M.D.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION

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INTRODUCTION

Nora D. Brayshaw respectfully submits this reply brief in further support of her Petition for a Writ of Certiorari to the New Jersey Superior Court Appellate Division ("Pet."). In her petition Brayshaw presented three questions concerning the meaning of procedural due process for the Court's review:

> (1) whether the State of New Jersey ("State") violated the Due Process Clause by protracting Brayshaw's post-suspension proceeding over a two and one-half year period lasting from September 9, 1987 to February 14, 1990;
>
> (2) whether the State violated the Due Process Clause by improperly shifting the burden of proof to Brayshaw to establish that the State's delay was unjustified; and
>
> (3) whether the State violated the Due Process Clause by denying Brayshaw access to other-physician records necessary for the cross-examination of the State's witnesses.

The State attempts no legally acceptable response to any of the questions raised by petitioner Brayshaw. As to petitioner's claim of unconstitutional delay (POINT I below), the State simply makes *no* effort to justify the facts that: (1) two and one-half years elapsed from her suspension on September 9, 1987 to final decision on February 14, 1990; and (2) only 56 hearing days were used of the 311 available between the commencement of the hearing on November 30, 1987 and its conclusion on April 18, 1989. Rather, it responds by attempting to blame Brayshaw for certain very minor parts of the delay by what is shown below to constitute deliberate distortion of the record.

In response to petitioner Brayshaw's claim that the State has improperly shifted the burden of proof to her to prove that the State's delay was unjustified (POINT II below), the State has squarely placed that issue before the Court by taking the harsh and untenable position that the burden should be placed on petitioner because Brayshaw's reputation was thoroughly destroyed by the initial order of suspension. (Brief in Opposition to Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division on Behalf of Respondent State of New

Jersey, State Board of Medical Examiners ("Resp. Br.") at 18) In grounding its defense on that obviously unacceptable premise, apparently accepted by the New Jersey Superior Court, Appellate Division, the State totally ignores this Court's precedents which emphasize the paramount nature of the petitioner's interest in a prompt hearing following the temporary suspension of a license. *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230 (1988); *Barry v. Barchi*, 443 U.S. 55 (1979); *Fusari v. Steinberg*, 419 U.S. 379 (1975).

In response to petitioner Brayshaw's claim that she was denied other-physician records of the patients at issue (POINT III below), the State contents itself with reliance on the "confidentiality" of the patient-physician privilege (Resp. Br. at i, 18) with its utterly unexplained and clearly erroneous *ipse dixit* of "non-pertinence" (*id.* at 20) and with a highly deceptive general assurance to this Court that Brayshaw actually received other-physician records, when the record, as demonstrated below, shows that this is true with respect to only three of the twenty-seven patients who were at issue. (*Id.*)

What is most disturbing about the State's opposition is its attempt, before this Court, to pursue further its campaign of character assassination by publication of false and unproven charges of misconduct. As is briefly shown below (POINT IV), this case involves nothing more than the ALJ's conclusions that petitioner Brayshaw should have obtained physical examinations of her clients before administering Synthroid, rather than relying on the findings as reported by her patients, as is common practice in her field of psychiatry, and her failure to return certain telephone calls personally. It does not involve any proven charges of the misprescription of drugs; of any physical consequences of such misprescription; of the spurious or financially improper use of DNB labs; or of strategies of attrition. (Resp. Br. at 6, 11) In its attempt to cover up its indefensible denial of due process to petitioner Brayshaw, the State seeks to "poison the well" of judicial review by tactics which might be merely unprofessional if practiced by private counsel but are clearly reprehensible in the hands of a public authority.

I. THE STATE FAILS TO PROVIDE ANY JUSTIFICATION FOR THE UNDULY PROTRACTED TWO AND ONE-HALF YEAR PERIOD OF PETITIONER BRAYSHAW'S POST- SUSPENSION HEARING.

In her petition, petitioner Brayshaw demonstrated that two and one-half years elapsed between her suspension on September 9, 1987, and the Board's Final Decision of February 14, 1990. (Pet. at 12)[1] She further demonstrated that the State used only 56 of 311 hearing days available from commencement of the hearings on November 30, 1987 to their completion on April 18, 1989. (Pet. at 13) The State does not dispute that no other court has ever upheld a post-suspension hearing as protracted as this one. (Pet. at 13) Nor does the State undertake the burden of justifying this protracted delay in any coherent, systematic fashion.

Rather, the State first mischaracterizes the question presented to this Court; Brayshaw does not contend that she is entitled to a "pre-determined date for a definite conclusion of a disciplinary proceeding". (Resp. Br. at 17) But procedural due process does require a state to insure a prompt hearing following the suspension of a license, which deprives its holder of the ability to earn a livelihood. While a state's failure to regulate the timing of such hearings may support a finding of a due process violation, *e.g., Gershenfeld v. Justices of the Supreme Court of Pa.*, 641 F. Supp. 1419, 1424-25 (E.D. Pa. 1986), the existence of such regulations does not by itself establish compliance with the demands of due process. *Barry v. Barchi*, 443 U.S. 55, 60-61 (1979). Even more clearly, the interstitial time limitations relied on by the State (Resp. Br. at 17-18) (which were extended and then violated in this case (Pet. at 8-9)) provide no defense for the undue protraction of the post-suspension process as a whole. In any event, affording due process must reflect a proper balancing of the interests of the individual against those of the state.

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[1] For the convenience of the Court, Brayshaw has used the same abbreviations as the State. (*See* Resp. Br. at 2) PaE refers to exhibits which Brayshaw has filed with the Clerk of the Court, and RaE refers to exhibits which the State has filed with the Clerk of the Court. Pa refers to Brayshaw's appendix.

However, as the Court explained in *Barchi*, after a temporary suspension, the licensee's "interest in a speedy resolution becomes *paramount*". *Id.* at 66 (emphasis added).

Apart from mischaracterizing the due process issue raised by the protracted proceedings below, the State seeks to defend them by launching a series of very narrow and highly disingenuous attacks on petitioner Brayshaw's alleged role in the proceedings. Perhaps the most outrageous (and revealing) of these attempts is the State's attempt to litigate by repetition of the sound-bite "strategy of attrition". (Resp. Br. at i, 6, 7, 16)

The State repeatedly quotes out of context the words "strategy of attrition" from a letter to counsel which was not a part of the record below and which was admitted into evidence in a separate, sealed proceeding to determine whether to permit Brayshaw's counsel to withdraw. (Resp. Br. at 6, 16) The purpose of the letter was to persuade counsel to continue to represent Brayshaw. In the letter Brayshaw explains that she has already paid legal fees approximating counsel's estimate for the entire case, and, referring to his "strategy of attrition", *complains* that counsel's appeals and objections have been expensive and ineffective. (Ra E10a) Having moved to expedite the case, even at the expense of foregoing discovery, and having proposed to limit the case to six patients, Brayshaw at all times sought a prompt resolution of the post-suspension hearing and never intended to prolong the proceedings. (*See* Pet. at 6) Given the context of the phrase, it is simply deceptive for the State to claim that petitioner Brayshaw "approved" (Resp. Br. at n.7) or "chose" (*id.* at 16) any such strategy.

Apart from playing misleading word games, the State claims that petitioner cancelled 16 of the 28 initially scheduled hearing dates which were to be held between November 30, 1987 and January 22, 1988. That claim is false. In fact, 17 of the 28 hearing days were utilized during that period. Of the remaining 11 days, the State admits that three were canceled by the State and only five are listed as adjourned at the request of petitioner on the records referred to by the State. (PaE 397a-400a)

The State contends that Brayshaw further contributed to the delay by cross-examining the State's only two expert witnesses for twice as many days as the State took to examine these witnesses on direct (Resp. Br. at 6) and by not appearing for the cross-examination of other witnesses after the withdrawal of Brayshaw's attorney. (*Id.* at 7) But a ratio of 2:1 cross-examination to direct examination is typical trial practice, and Brayshaw's failure to cross-examine most witnesses could only have expedited the proceedings.[2] The State is likewise wrong in attributing delay to Brayshaw's request that the State call only two witnesses per day. (Resp. Br. at 7) Neither the ALJ nor the State ever complied with this request. In fact, out of the ten hearing days following that request of January 10, 1989, the State called four witnesses on one day, three witnesses on two days and one witness on five days, thus exposing the State's reliance on petitioner's request of January 10 as pure chicanery. (PaE 405a-406a)

Viewed as a whole, the State's attempts to justify its protracted two and one-half year proceeding deal with only a small fraction of the 311 potential hearing days at issue and do not even attempt to justify the additional ten months which elapsed between the close of hearings on April 18, 1989 and final decision on February 14, 1990. Worse yet, each of the State's attempts is, upon analysis, a plain distortion of the record below. Given the showing made before this Court, petitioner respectfully submits that the State has proffered no reasonable justification for

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[2] The State repeatedly and misleadingly complains of the "extraordinary burdens she [Brayshaw] had placed on the ALJ and the Board by her departure from the State" and seeks to indict Brayshaw for the crime of failing to provide her home address. (Resp. Br. at 16, 21) But the State never identifies the burdens which Brayshaw's move entailed. When Brayshaw initially moved to California, she was represented by counsel, through whom the State continued to contact her. As the State acknowledges, she subsequently provided her husband's business address and maintained communications throughout the case. (*Id.* at 16) Because of her inability to obtain discovery and the expense of repeated trips to New Jersey, she decided not to attend much of the testimony, consequently accelerating the hearing.

a post-suspension proceeding more protracted than any ever sanctioned by a Federal court.

II. THE STATE IMPROPERLY PLACES THE BURDEN OF PROOF AS TO THE REASONS FOR DELAY ON PETITIONER.

As set forth in the Petition, this Court has recognized that once a professional's license has been suspended, that individual's interest in speed becomes paramount. *Barry v. Barchi*, 443 U.S. at 66. Here, the Appellate Division clearly subordinated petitioner's interest in a prompt determination to the State's general interest in professional regulation: "Hence the right of doctors to practice their profession is necessarily subordinate to this governmental interest." (Pa 9a-10a)

In its opposition, the State justifies its subordination of petitioner's interest by arguing that since the Board's initial suspension completely destroyed her reputation, her interest in a prompt proceeding may be disregarded. (Resp. Br. at 18) A more callous and unacceptable resolution to the problem of balancing the interests of the State and the individual could not be imagined. Standing logic on its head, the State argues that the greater the injury inflicted, the less weight should be accorded the individual's right to its speedy review. It also defies common sense to assert that petitioner's harm was not compounded by her protracted exclusion from the practice of medicine which the unduly delayed hearing inflicted.

The State's excuse that complexity justifies the two and one-half year delay borders on the ludicrous. Virtually all the violations found dealt with petitioner's failure to obtain physical examination data or to answer all telephone calls personally. These charges did not involve factual disputes. Petitioner offered to stipulate the facts based on a limited number of patients. These generic standard of care issues applicable to a practising psychiatrist could have been decided on the basis of expert testimony in less than a month.

Realizing the harshness of its position, the State misleadingly argues that petitioner could have resumed practice by accepting certain reasonable restrictions. That is false. As the ALJ

recognized: "Dr. Brayshaw's major area of interest was the interrelationship between thyroid disorder and mental illness." (PaE 115a) Without the ability to prescribe Synthroid, Brayshaw could not continue to treat her patients. While the State claims she was free to practice medicine during the pendency of the suspension hearing (Resp. Br. at 4-5, 15-17), she could only do so by abandoning the use of Synthroid therapy and establishing a new specialty. (Pet. at 10) Contrary to the State's claim that she sought "to vacate the temporary suspension without accepting the protective provisions" (Resp. Br. at 17), Brayshaw made several proposals to the State which suggested strict protocols for the prescribing of Synthroid and otherwise complied with all of the Board's restrictions; the State did not even respond to those proposals.

III. THE STATE FAILS TO PROVIDE ANY ACCEPTABLE JUSTIFICATION FOR ITS DENIAL OF MATERIALS NECESSARY TO THE CROSS-EXAMINATION OF THE STATE'S WITNESSES.

The State responds to petitioner's need for other-physician records relating to the patients at issue by (1) asserting their confidentiality deriving from the patient-physician privilege (Resp. Br. at i, 19); (2) asserting their "non-pertinence to the charges against" petitioner (*id.* at 20); and (3) misleadingly suggesting that she was provided with such information. (*Id.*)

In relying on the confidentiality of patient-physician records, the State tenders to this Court for decision the unresolved question raised in Dr. Brayshaw's petition: may the State withhold information necessary for cross-examination of hostile witnesses on the ground of the patient-physician privilege?

The State moves on to assert without explanation the "non-pertinence" of other-physician records. That position is untenable. Petitioner Brayshaw has explained that many of the symptons, upon which the State relied in charging her with failure to conduct physical examinations personally, were characteristic of her patient cohort, whether or not she prescribed Synthroid. (Pet. at 18) These symptoms would have been revealed in the records kept by other physicians treating Dr. Brayshaw's patients. These

records would have directly contradicted the witnesses' testimony that the symptoms were due to petitioner's prescription of Synthroid. How it can be said, under these circumstances, that the records are "non-pertinent" defies understanding.

The State further argues without substantiation that the ALJ made available numerous records of other physicians treating the patients at issue, although the State does not dispute the existence of a procedure which permitted the ALJ unfettered discretion to deny the production of such records and to review records *in camera* to determine if Brayshaw should be permitted access to them.[3] The State proceeds to suggest, with calculated ambiguity, that petitioner in fact received the necessary other-physician testimony. That is simply false. The exhibit list upon which the State relies indicates the production of other-physician records concerning only three of a total of twenty-seven patients.[4] (*See* RaE 16a-28a, exhibits R-11, R-23 and R-152)

IV. IN AN EFFORT TO DISTRACT THE COURT FROM ITS DENIAL OF DUE PROCESS, THE STATE IMPROPERLY INTRODUCES UNPROVEN, IRRELEVANT ALLEGATIONS OF MISCONDUCT.

Although irrelevant and deplorable, the State's personal attack on petitioner Brayshaw, by publication of unproven charges, compels a brief response. The State contends, for instance, that

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[3] Although the State's argument suggests otherwise, Brayshaw does not allege any due process violation as a result of the ALJ's failure to permit her discovery of the treatment records of persons who were not patients. (Resp. Br. at 19)

[4] The remaining patient records, which appear on the exhibit list, consist of either Brayshaw's records or records of testifying experts.

The State complains repeatedly about Brayshaw's failure to provide the Court with the exhibit list. Because neither party produced the list in the appellate proceedings in the New Jersey state court, counsel was unaware that this document was part of the ALJ's decision. The State further complains of counsel's oversight in failing to produce the corrected Board decision. While the insignificance of the corrections is apparent from the State's failure to produce the corrected version for this Court, accompanying this reply brief is a copy of the corrected decision which Brayshaw is simultaneously lodging with the Clerk of the Court.

Brayshaw attempted to misrepresent the results of laboratory studies and improperly profited from her participation in DNB Laboratories, a corporation established to coordinate and supervise the laboratory testing of Brayshaw's patients. (Resp. Br. at 4, 10, 11, 14 and 15) While petitioner's disclosures with respect to DNB Laboratories were deemed inadequate, the ALJ found that DNB Laboratories' charges corresponded to its expenses and that Brayshaw's modification of laboratory reports reflected the reasonable exercise of her medical judgment. (PaE 130a, 132a) The ALJ concluded:

> "To the extent that Respondent 'changed' any reference range utilized by other laboratories . . . these acts were not deliberately calculated to mislead or deceive any patient. . . . Rather, I accept respondent's assertion that any adjustments were the product of her sincere effort more accurately to gauge the medical status of the patient in light of the results obtained from the testing." (PaE 132a)

In finding #16, the ALJ expressly noted that DNB's charges were such as to "legitimately" take into account its various costs and expenses, concluding that "in no instance was DNB's charge so exorbitant as to raise a serious question with regard to the propriety of its charge". (PaE 130a)

Likewise, the State recklessly alleges that Brayshaw intimidated witnesses (Resp. Br. at 4) but again fails to describe the ultimate findings of the ALJ and the Board, both of which ultimately dismissed this charge as without merit. (Pa 50a; PaE 263a)

Most misleadingly, the State erroneously suggests that Brayshaw caused harm to her patients by the prescription of Synthroid. The Board did *not* sanction Brayshaw for the prescribing of Synthroid and did *not* find that the dosages prescribed placed any of her patients in danger or caused the "panoply of horrors" which the State alleges. (Resp. Br. at 15 n.11) (Pa 17a-18a)

Thus, despite all of the State's accusations of "imminent peril to the public" (Resp. Br. at i) and its reckless detailing of

unproven charges, this case remains one in which the State, in violation of petitioner's due process rights, destroyed a professional's promising career simply because she, consistent with the practice of psychiatrists, did not insist on the delivery of physical examination reports or personally answer all of her patients' telephone calls. (Pa 18a-21a) The State's opposition, in its vindictiveness and carelessness, does little more than expose the mentality which led to petitioner's denial of due process below.

CONCLUSION

For the foregoing reasons and those discussed in the petition, this Court should grant the writ of certiorari.

Respectfully submitted,

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